

Past Wrongs, Present Futility, and the Future of Prisoner Relief: A Reasonable Interpretation of “Available” in the Context of the PLRA

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INTRODUCTION

While transferring Wayne Cooper from the Greenville Correctional Institute to Levenworth, prison guards slammed his head

into the side of the bus.¹ The guards beat Cooper, punching him in the head and chest with blunt objects and striking his genitals while performing a rough pat-down search.² Cooper sued the prison and guards for violating his civil rights.³ In Texas, a prisoner claimed the prison violated his civil rights because he received a jar of creamy peanut butter instead of the chunky type he requested.⁴ A Pelican Bay prisoner sued a prison when guards allegedly opened his shower door and allowed two other prisoners to beat him savagely.⁵ Another prisoner sued prison guards for confiscating his pornographic mail, claiming that the guards were frustrating his attempt to obtain an obstetrics-gynecology doctorate degree.⁶ These examples demonstrate the spectrum of prisoner lawsuits, thousands of which are filed in the United States every year.⁷

In 1995, prisoners' lawsuits comprised more than twenty-five percent of all civil cases filed in the federal district courts.⁸ The states spent approximately \$81,000,000 defending, processing, and deciding these claims.⁹ In response to this explosion of inmate

¹ See *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *1 (D. Kan. Aug. 14, 1998).

² See *id.*

³ See *id.*

⁴ See 141 CONG. REC. S14,611-01 (1995) (statement of Sen. Dole) (discussing frivolous inmate grievances that clog court system, waste resources, and decrease quality of legal system). The senators trying to pass the PLRA recited numerous examples of frivolous prisoner lawsuits. See *id.* Some of these cases include prisoners that have sued the prison for being forced to listen to his unit manager's country music, for not being invited to a pizza party for a departing employee, for being given Converse tennis shoes when he wanted Reeboks, and because prison guards took his Gameboy away. See *id.*

⁵ See *Palomino v. Stanton*, No. C96-2984, 1998 WL 196461, at *1 (N.D. Cal. Apr. 21, 1998).

⁶ See Genevieve Anton, *Lawmakers Seek to Halt Silly Lawsuits by Prisoners*, COLO. SPRINGS GAZETTE TELEGRAPH, Mar. 22, 1998, available in 1998 WL 7983953 (giving examples of prisoners' frivolous suits).

⁷ See 142 CONG. REC. S10,576-02 (1995) (stating that in 1995, prisoners filed 63,500 lawsuits in federal court); 141 CONG. REC. S14,408-01 (1995) (stating that in 1994, prisoners filed over 39,000 lawsuits).

⁸ See Eugene Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 362 (1998) (discussing number of prisoners that sue in federal court and stating that prisoners' lawsuits constitute large portion of federal court docket). In Colorado alone, lawsuits filed by prisoners in 1997 cost the state more than \$456,000. See Anton, *supra* note 6. And, South Carolina spent over \$1 million to defend against prisoner lawsuits. See 141 CONG. REC. S14,611-01 (1995) (statement of Sen. Thurmond).

⁹ See Denise M. Pennick, *Limitations of Relief: Prisoner Litigation*, 17 HAW. B.J. 6, 6 (1997) (citing National Association of Attorney General statistics). See generally 141 CONG. REC. S14,611-01 (1995) (stating that majority of states' costs arise from defending prisoners')

litigation and its negative impact on the judicial system,¹⁰ Congress enacted the Prison Litigation Reform Act ("PLRA").¹¹

To decrease inmate litigation that burdened the courts, the PLRA changed several statutes governing the procedures for filing prisoner lawsuits.¹² Section 1997e(a) implements one of these changes by providing that a prisoner must exhaust all "available administrative remedies" before filing a civil rights action in federal court.¹³ However, the PLRA failed to define the meaning of an

meritless lawsuits); Kuzinski, *supra* note 8, at 368 (stating that states spend over \$80 million per year dealing with frivolous prisoner litigation that burdens federal courts and increases cost of administration). Kuzinski writes that government defenders must often respond to prisoners' suits with motions and briefs before courts can dismiss them as frivolous. *See id.* He also states that this wastes time and state resources. *See id.*

¹⁰ *See* Kuzinski, *supra* note 8, at 364 (stating that large numbers of prisoners' suits frustrate judges, court clerks, attorneys, magistrates, and law clerks who have to deal with them); *see also* 141 CONG. REC. S14,611-01 (1995) (stating that Nevada federal judiciary spends 40% of its time on inmate litigation). Senator Reid also stated that frivolous prisoner litigation ties up the courts, wastes legal resources, and detrimentally affects the quality of the judicial system. *See* 141 CONG. REC. S13,611-01 (1995).

¹¹ Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, § 101(a), 110 Stat. 1321-66 (1995); *see also* 141 CONG. REC. S14,611-01 (1995) (introducing PLRA as legislation that will do away with frivolous prisoner lawsuits); *Moore v. Smith*, 18 F. Supp. 2d 1360, 1362 (N.D. Ga. 1998) (stating that Congress introduced PLRA to decrease tide of meritless prisoner cases); *Allen v. Sanders*, No. 298-C0065, 1998 WL 318841, at *1 (N.D. Tex. June 4, 1998) (noting that Congress passed PLRA intending to curb frivolous inmate litigation); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *5 (N.D. Ill. Feb. 19, 1998) (noting that Congress enacted PLRA with intent to prevent prisoners from burdening courts); J. Clegg Ivey III & Revecca C. Luzko, *The Sixth Circuit Year in Review: Leading Cases of 1997*, 28 U. MEM. L. REV. 345, 400 (1998) (stating that Congress passed PLRA to curtail prisoner litigation); Pennick, *supra* note 9, at 6 (stating that Congress designed PLRA to relieve burdened justice system); Kuzinski, *supra* note 8, at 364 (noting that majority of prisoner lawsuits are frivolous or meritless).

¹² *See* Prison Litigation Reform Act § 101(a); *Clark v. California*, No. 96-C1486, 1998 WL 242688, at *2 (N.D. Cal. May 11, 1998) (noting that PLRA changed previous exhaustion requirement by making it mandatory); *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1202 (E.D. Cal. 1997) (stating that PLRA changed statutes governing federal civil rights proceedings); *Morgan v. Arizona Dep't of Corrections*, 976 F. Supp. 892, 895 (D. Ariz. 1997) (discussing changes PLRA made to its predecessor, section 1997e).

¹³ *See* 42 U.S.C. § 1997e(a) (Supp. III 1997); *see also* *Wright v. Morris*, 111 F.3d 414, 417 (6th Cir. 1997) (stating that PLRA amended section 1997e to require prisoners to first exhaust all available administrative remedies); *Hitchcock v. Nelson*, No.96-C4766, 1997 WL 433668, at *2 (N.D. Ill. July 28, 1997) (holding that PLRA bars inmate's suit under section 1983 or federal law until inmate exhausts all available administrative remedies); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3573 (Supp. 1998) (stating that statute provides that prisoners cannot sue over prison conditions before exhausting all available administrative remedies). Section 1997e(a) states in relevant part: "No action shall be brought with respect to prison conditions under section 1983 or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

available administrative remedy.¹⁴ As a result, courts have applied the exhaustion requirement differently.¹⁵

Specifically, many courts have struggled to determine whether a “futility exception” may excuse the exhaustion requirement.¹⁶ A futility exception would exempt prisoners from section 1997e(a) if exhausting the prison’s administrative grievance system would be futile.¹⁷ Prisons do not provide damages as an administrative remedy.¹⁸ Therefore, several courts have concluded that the exhaustion requirement does not apply to prisoners’ damages requests because exhaustion is futile.¹⁹

¹⁴ See 42 U.S.C. § 1997e(a); *Lacey*, 990 F. Supp. at 1204-05 (stating that court must give statute’s language plain meaning due to absence of definitions within statute).

¹⁵ See, e.g., *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (holding that prisoners can only exhaust remedies that are actually available); *Spence v. Mendoza*, 993 F. Supp. 785, 787 (E.D. Cal. 1998) (holding that Congress conditions exhaustion requirement on available remedies irrespective of their effectiveness); *Russo v. Palmer*, 990 F. Supp. 1047, 1050 (N.D. Ill. 1998) (requiring exhaustion for inmate’s request for prospective relief, but not for monetary damages); see also *Ivey & Lutzko*, *supra* note 11, at 400 (stating that PLRA provisions illustrate sloppy legislative drafting).

¹⁶ See *Garrett*, 127 F.3d at 1266 (deciding whether prisoners that sue for money must exhaust all available administrative remedies); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998) (following cases that do not require prisoners to exhaust administrative system when system fails to provide requested relief); *Moore*, 18 F. Supp. 2d at 1363-64 (discussing different applications of PLRA and rejecting view that prisoners that sue for money do not need to exhaust all available administrative remedies); *Lacey*, 990 F. Supp. at 1204 (deciding what administrative remedies Congress intended to include in section 1997e(a)).

¹⁷ See *Deltona Corp. v. Alexander*, 682 F.2d 888, 893 (11th Cir. 1982) (explaining that exhaustion rule does not exist when administrative remedy is inadequate, fails to provide plaintiff with requested relief, or unreasonably delays relief); Steven H. Steinglass, *Litigating Section 1983 Actions in State Courts*, in *CIVIL RIGHTS LITIGATION 1997*, at 815, 845 (PLI Litig. & Admin. Practice Course Handbook Series No. 576, 1997) (noting that prisoners do not have to exhaust grievance system in section 1983 action).

¹⁸ See *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (holding that exhaustion requirement does not apply to prisoner suing for damages); *Garrett*, 127 F.3d at 1266 (holding that prisoner does not have to exhaust administrative remedies because monetary relief does not exist); *Hollimon*, 6 F. Supp. 2d at 970 (holding that courts should not require prisoner requesting damages to exhaust administrative system that only provides prospective relief); *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (stating that Illinois’s grievance procedures do not allow prisoners to recover damages); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (stating that prison’s grievance system could not have compensated prisoner seeking monetary relief); *Russa*, 990 F. Supp. at 1050 (stating that prison’s administrative grievance process does not provide damages); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (allowing prisoner’s damages claim to proceed because administrative system allows compensatory damages); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *4 (N.D. Ill. Feb. 10, 1998) (holding that administrative system only providing prospective relief is not remedy for prisoner that sues for damages).

¹⁹ See *Lunsford*, 155 F.3d at 1179 (refusing to require prisoner suing for damages to exhaust administrative remedies because grievance system only provided prospective relief); *Garrett*, 127 F.3d at 1267 (holding that prisoner did not have to exhaust prison’s grievance system because no monetary remedies exist); *Moore*, 18 F. Supp. 2d at 1363 (noting that

In contrast, other courts have held that section 1997e(a)'s exhaustion requirement does apply to prisoners seeking monetary relief.²⁰ These courts hold that Congress mandated exhaustion, so prisoners must exhaust their administrative remedies before bringing a claim in court, even when suing for damages.²¹ Accordingly,

many courts excuse exhaustion requirement when prisoners sue for monetary relief because prison grievance systems do not provide damages); *Hollimon*, 6 F. Supp. 2d at 970 (stating that administrative grievance system available to plaintiff does not provide monetary relief so exhaustion requirement did not apply); *Lacey*, 990 F. Supp. at 1208 (concluding that prison's grievance system was not available because plaintiff's injuries resulted from past event); *Jackson*, 998 F. Supp. at 904 (stating that grievance procedures in Illinois do not award monetary relief); *Freeman*, 996 F. Supp. at 825 (holding that grievance procedure could not redress plaintiff because plaintiff asked for damages and grievance system only provided prospective relief); *Russo*, 990 F. Supp. at 1050 (agreeing with precedent that section 1997e(a) does not apply to claims involving damages); *Cooper*, 1998 WL 560044, at *3 (holding that court does not require plaintiff to exhaust administrative remedies for damages request); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *6 (N.D. Ill. Feb. 10, 1998) (stating that when damages provide plaintiff's only meaningful relief, court does not require prisoner to exhaust all administrative remedies).

²⁰ See *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding that prisoner suing for damages must exhaust all administrative remedies in light of statute's plain language); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) (dismissing complaint because plaintiff failed to prove inadequacy of administrative remedies); *Moore*, 18 F. Supp. 2d at 1364 (finding prisoner's futility claim unpersuasive); *Allen v. Sanders*, No. 2:98-CV-0065, 1998 WL 318841, at *10 (N.D. Tex. June 4, 1998) (dismissing plaintiff's complaint for damages because plaintiff failed to exhaust all available administrative remedies); *Pinkston-El v. Washington*, No. 97-C8924, 1998 WL 293196, at *7 (N.D. Ill. May 22, 1998) (stating that PLRA's language mandates exhaustion); *Delgado v. Randall County*, No. 2:98-CV-0055, 1998 WL 159937, at *1 (N.D. Tex. Mar. 31, 1998) (stating that prisoner must exhaust prison's administrative grievance procedure before suing in federal court). In addition, several courts in California have dismissed prisoners' claims for failure to exhaust all available administrative remedies. See *Bearden v. Godfrey*, No. C98-02294, 1998 WL 456294, at *1 (N.D. Cal. July 27, 1998); *Palomino v. Stanton*, No. C96-2984, 1998 WL 196461, at *3 (N.D. Cal. Apr. 21, 1998). Although the Ninth Circuit case *Lunsford v. Jumao-As* has arguably overruled these cases, they are distinguishable from *Lunsford* and therefore may still be good law. Compare *Lunsford*, 155 F.3d at 1179, with *Bearden*, 1998 WL 456294, at *1, and *Palomino*, 1998 WL 196461, at *1. For example, in *Palomino*, the plaintiff sued the prison after guards allegedly allowed another prisoner to beat him. See 1998 WL 196461, at *1. Unlike the plaintiff in *Lunsford*, the plaintiff in *Palomino* sued for both prospective relief and damages. See *id.* The court dismissed the plaintiff's claims because they were not properly exhausted. See *id.* at *4. However, some may argue that the plaintiff had an available administrative remedy because he was seeking prospective relief. See *id.* This differs from *Lunsford*, in which the plaintiff only sought damages. See 155 F.3d at 1179.

²¹ See *Moore*, 18 F. Supp. 2d at 1364 (requiring that even prisoners suing for money must exhaust all available administrative remedies). The *Moore* court set forth five reasons to explain its decision. See *id.* First, the court stated that section 1997e(a) did not require courts to assess a prison's administrative grievance system. See *id.* Second, if prisoners suing for money did not have to comply with section 1997e(a), they could easily avoid the requirement by including a damages request in their complaint. See *id.* Third, the court pointed out several benefits of requiring prisoners to exhaust the administrative system. See *id.* For example, such a requirement allows prisons to internally resolve grievances. See *id.* Fourth, the federal judiciary has an interest in having prisons initially attempt to resolve

these courts dismiss prisoners' complaints when prisoners fail to satisfy section 1997e(a).²²

In the majority of PLRA cases that contemplate a futility exception, courts focus on the administrative remedies available to the plaintiff.²³ For example, courts often explore whether prospective relief²⁴ can cure the plaintiff's grievance.²⁵ However, few courts have invoked a futility exception based on the wrong the prisoner has suffered.²⁶

Courts that do focus on the wrong the prisoner has suffered often distinguish between past and ongoing wrongs.²⁷ Because by the

prisoner grievances. *See id.* Finally, the court explained that prisoners can receive satisfactory relief through the grievance system. *See id.*

²² *See Brown*, 139 F.3d at 1104 (requiring plaintiff to exhaust state administrative remedies); *White*, 131 F.3d at 595 (dismissing inmate's suit for failure to exhaust all available administrative remedies); *Moore*, 18 F. Supp. 2d at 1363-64 (disagreeing with cases that allow prisoners' damages claims to proceed without exhaustion); *Pinkston-El*, 1998 WL 293196, at *1 (stating that PLRA requires exhaustion of all available administrative remedies); *Allen*, 1998 WL 318841, at *9 (stating that court barred prisoner's claims because he did not comply with section 1997e(a)); *Delgado*, 1998 WL 159937, at *2 (stating that plaintiff failed to exhaust prison's grievance system); *Montez*, 1998 WL 158643, at *2 (dismissing plaintiff's case because plaintiff failed to exhaust all available administrative remedies).

²³ *See Lunsford*, 155 F.3d at 1179 (holding that section 1997e(a) did not apply to plaintiff because administrative system provided no remedy); *White*, 131 F.3d at 594 (finding that plaintiff alleging that grievance system did not provide adequate remedies must first exhaust administrative remedies); *Garrett*, 127 F.3d at 1266 (stating that no administrative grievance procedures were available for monetary damage claims); *Moore*, 18 F. Supp. 2d at 1364 (stating that administrative grievance system can provide prisoner with remedy); *Hollimon*, 6 F. Supp. 2d at 969-70 (stating that administrative grievance system is not available remedy to prisoner that sues for damages); *Jackson*, 998 F. Supp. at 904 (holding that Illinois' grievance system did not provide monetary relief and finding that prisoner suing for damages had no available administrative remedy to exhaust); *Freeman*, 996 F. Supp. at 825 (holding that prisoner suing for past wrong has no administrative remedies to exhaust); *Russo*, 990 F. Supp. at 1049 (stating that plaintiff suing for money had no available administrative remedies to exhaust); *Bearden*, 1998 WL 456294, at *1 (making grievance system available to prisoner because prison conditions had adversely affected prisoner); *Pinkston-El*, 1998 WL 293196, at *7 (stating that fairness requires prisoner to give prison administrator opportunity to correct inhumane conditions through exhaustion of administrative remedies); *Sanders*, 1998 WL 67615, at *4 (stating that if administrative system can remedy prisoner's grievance, it is available); *Lacey*, 990 F. Supp. at 1205 (stating that because plaintiff was suing for money, administrative grievance system was not an available remedy).

²⁴ The term "prospective relief" means any corrective action that a prison can take to remedy a wrong.

²⁵ *See Lunsford*, 155 F.3d at 1179 (holding that prison's remedies could not cure past wrong); *Garrett*, 127 F.3d at 1266 (stating that monetary damages were not available through administrative grievance procedures).

²⁶ *See Lunsford*, 155 F.3d at 1179 n.1 (stating that plaintiff's claim only involved past conduct by prison guards); *Freeman*, 996 F. Supp. at 825 (holding that prison's administrative grievance system could not have provided relief to plaintiff after his injuries occurred).

²⁷ *See Lunsford*, 155 F.3d at 1179 n.1 (stating that plaintiff's claim only involved past conduct by prison guards); *Hollimon*, 6 F. Supp. 2d at 970 (stating that prisoner was not likely

very nature of past wrongs, the action causing harm has ceased, prospective relief fails to provide prisoners with an effective remedy and is almost always unavailable as an administrative remedy.²⁸ In contrast, prospective relief can remedy continuing harm caused by ongoing wrongs.²⁹

This Comment discusses whether courts should adopt a futility exception for prisoners that seek monetary relief for past wrongs. Part I examines the history of the PLRA, the underlying reasons Congress enacted the exhaustion requirement, and relevant remedies that prisoners utilize. Following this overview, Part II illustrates how courts apply section 1997e(a) inconsistently,³⁰ and Part III analyzes these current applications. Finally, Part IV proposes that courts apply a futility exception to the exhaustion requirement for both state and federal prisoners that seek damages for past wrongs.

I. BACKGROUND

In 1995, more than 65,000 prisoners filed federal lawsuits regarding prison conditions, exploding from a mere 6600 twenty years

to suffer wrong again in future because wrong at issue was one-time event); *Jackson*, 998 F. Supp. at 904 (explaining that guards beat prisoner in past); *Freeman*, 996 F. Supp. at 825 (holding that prison's administrative grievance system could not have provided relief to plaintiff once his injuries occurred); *Lacey*, 990 F. Supp. at 1208 (concluding that prisoner's claim arose from past event).

²⁸ See *Lunsford*, 155 F.3d at 1179 (holding that plaintiff suffered past wrong and finding administrative grievance procedure unavailable because it only provides injunctive relief); *Hollimon*, 6 F. Supp. 2d at 970 (stating that administrative grievance system available to plaintiff could not provide monetary relief, which is only remedy for past wrong to plaintiff); *Jackson*, 998 F. Supp. at 904 (holding that because guards already beat plaintiff no administrative remedies were available for him to exhaust); *Freeman*, 996 F. Supp. at 825 (holding that grievance procedure that only provides prospective relief could have done nothing for plaintiff who suffered past wrong); *Lacey*, 990 F. Supp. at 1208 (holding that in absence of damages provision, administrative grievance system is not available remedy for plaintiff's past wrong).

²⁹ See *Pinkston-El v. Washington*, No. 97-C8924, 1998 WL 293196, at *2-7 (N.D. Ill. May 22, 1998) (requiring prisoner alleging that prison violated his right to practice religion to exhaust all available administrative remedies); *Montez v. Swart*, No. 298-C0004, 1998 WL 158643, at *1 (N.D. Tex. Mar. 19, 1998) (requiring prisoner with sores all over his body that prison had not treated to comply with section 1997e(a)).

³⁰ See *Lunsford*, 155 F.3d at 1179 (allowing futility exception to exhaustion requirement); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (dismissing prisoner's entire suit for failure to exhaust all available administrative remedies); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (dismissing prisoner's prospective claim, but allowing damages claim to proceed).

earlier.³¹ Courts routinely dismissed these complaints as legally frivolous.³² Congress enacted the PLRA to relieve the overburdened federal court system by curtailing inmate litigation,³³ and to restrict judicial management of prison systems.³⁴

A. Prisoners' Remedies

Congress sought to reduce both prisoner litigation and judicial interference with prison management by requiring prisoners to utilize the prison's internal grievance procedures.³⁵ Under the PLRA, prisoners can sue in federal court only after exhausting the prison's administrative grievance system.³⁶ The pertinent remedies prisoners' most often use include administrative remedies, section 1983 actions, and *Bivens* actions.

1. Administrative Remedies

When prisoners suffer a wrong, according to section 1997e(a), they must first turn to the prison's administrative grievance sys-

³¹ See 141 CONG. REC. S14,611-01 (1995) (statement of Sen. Dole) (stating that number of lawsuits prisoners file has grown astronomically since 1975); Kuzinski, *supra* note 8, at 362 (discussing massive increase of prisoner litigation).

³² See 141 CONG. REC. S14,611-01 (1995) (statement of Sen. Hatch) (stating that courts dismiss roughly 94% of prisoner lawsuits before pretrial phrase).

³³ See *id.* (quoting Sen. Hatch's introduction of PRLA to Congress as legislation that will relieve overburdened court system from frivolous inmate lawsuits).

³⁴ See 141 CONG. REC. S14,408-01 (1995) (statement of Sen. Dole) (stating that statute will restrain judicial micromanagement of prisons); see also Kuzinski, *supra* note 8, at 373 (stating that part of Congress's concern in enacting PLRA was to restrict judicial interference in prison system management).

³⁵ See 141 CONG. REC. S14,611-01 (statement of Sen. Hatch) (stating that PLRA will help relieve overburdened court system by reducing prisoner litigation); 141 CONG. REC. S14,408-01 (statement of Sen. Dole) (stating that statute will restrain judicial micromanagement of prisons); see also *Moore v. Smith*, 18 F. Supp. 2d 1360, 1362-64 (N.D. Ga. 1998) (stating that Congress passed PLRA to restrain wave of frivolous prisoner cases); *Delgado v. Randall County*, No. 298-C0055, 1998 WL 159937, at *1 (N.D. Tex. Mar. 31, 1998) (noting that Congress enacted PLRA to curb frivolous prisoner litigation and to discourage judicial management of prisons).

³⁶ See *Brown v. Toombs*, 139 F.3d 1102, 1103-04 (6th Cir. 1998) (dismissing prisoner's suit because prisoner brought section 1983 action in federal court before exhausting prison's administrative grievance procedures); *Moore*, 18 F. Supp. 2d at 1363 (dismissing plaintiff's suit because plaintiff sued before exhausting all available administrative remedies); *Montez v. Swart*, No. 298-C0004, 1998 WL 158643, at *2 (N.D. Tex. Mar. 19, 1998) (declaring that exhaustion requirement is mandatory and that courts no longer have discretion to provide prisoners with continuances); Kuzinski, *supra* note 8, at 380 (stating that PLRA's exhaustion requirement attempts to bar prisoners from bringing suit into court until absolutely necessary).

tem.³⁷ This system only provides prospective relief.³⁸ The federal prison and each state's prison system have procedures that detail the requirements prisoners must follow when filing a complaint with the prison.³⁹ Courts deem exhaustion complete under section 1997e(a) only after prisoners have complied with all of the prison's grievance procedures.⁴⁰

Although regulations governing prison grievance procedures differ in each state, the systems operate similarly overall.⁴¹ The prisoner typically files a grievance with the prison staff.⁴² The prisoner can appeal an unfavorable decision and with each appeal a prison official with greater authority hears the claim.⁴³ Only after the

³⁷ See 42 U.S.C. § 1997e(a) (Supp. III 1997) (requiring prisoners to exhaust all available administrative remedies before suing in federal court).

³⁸ See, e.g., *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (stating that administrative grievance system only provides prospective relief); *Russo v. Palmer*, 990 F. Supp. 1047, 1050 (N.D. Ill. 1998) (stating that prison's administrative system does not provide monetary relief).

³⁹ See 28 C.F.R. § 542.10 (1996) (allowing federal prisoners to seek formal review of issues relating to imprisonment); ALASKA ADMIN. CODE tit. 22, § 05.185 (1998) (explaining three-step prisoner grievance procedure); CAL. CODE REGS. tit. 15, §§ 3084.1-5 (1998) (describing four-step process prisoners must complete to exhaust prison's administrative remedies); FLA. ADMIN. CODE ANN. r. 33-29.006 (1998) (setting forth process prisoner must follow to exhaust grievance system); ILL. ADMIN. CODE tit. 20, §§ 504.810-850 (1998) (setting forth four-step prisoner appeal process); KAN. ADMIN. REGS. 44-15-101 (describing inmate grievance procedures); N.Y. COMP. CODES R. & REGS. tit. 9, §§ 7092.3-5 (1998) (explaining steps inmates must take to exhaust grievance procedure); OHIO ADMIN. CODE § 5120-9-31 (1998) (outlining four-step grievance and appeal process); OR. ADMIN. R. 291-109-0015 (1998) (explaining Oregon prisons' grievance procedures); WIS. ADMIN. CODE § 3010.04 (1998) (setting forth procedures prisoners must follow to exhaust grievance system). For example, California state prisoners may appeal any action, decision, policy, or condition that adversely affects their welfare. See CAL. CODE REGS. tit. 15, § 3084.1. To exhaust their administrative remedies, prisoners must complete a four-step appeal process. See *id.* § 3084.1-5. First, prisoners must attempt to informally resolve the problem with the staff member involved in the action or decision they are appealing. See *id.* § 3084.2. If the first step fails, prisoners must then submit a formal appeal with a staff person not involved in the event or decision they are appealing. See *id.* If the prisoners are unsuccessful, they must submit a formal appeal that the head of the prison or a designee conducts. See *id.* § 3084.5. If the appeal is not resolved at this stage, prisoners finally must submit a formal appeal for review to the Director of the California Department of Corrections or the director's designee. See *id.*

⁴⁰ See *Brown*, 139 F.3d at 1104 (stating that court should dismiss prisoner's case because prisoner failed to show that he exhausted administrative remedies); *Moore*, 18 F. Supp. 2d at 1364 (stating that prisoner failed to appeal prison's denial of his grievance).

⁴¹ See, e.g., ALASKA ADMIN. CODE tit. 22, § 05.185; ILL. ADMIN. CODE tit. 20, §§ 504.810-850. Both Alaska and Illinois set up grievance procedures that operate similarly. See ALASKA ADMIN. CODE tit. 22, § 05.185; ILL. ADMIN. CODE tit. 20, §§ 504.810-850.

⁴² See CAL. CODE REGS. tit. 15, § 3084.2 (1998) (stating that first step for prisoner in exhausting prison's grievance system is to file complaint with prison staff).

⁴³ See *id.* §§ 3084.2-5.

prisoner appeals to the highest level of internal review has the prisoner exhausted the administrative grievance system.⁴⁴

2. Section 1983

After state prisoners satisfy section 1997e(a), they may seek alternative relief.⁴⁵ State prisoners alleging civil rights violations generally sue under 42 U.S.C. § 1983,⁴⁶ which allows citizens to sue for wrongs that state officers commit against them.⁴⁷ To succeed in a section 1983 action, individuals must prove that a state official violated one of their constitutional or federal rights.⁴⁸

3. *Bivens* Actions

While section 1983 allows citizens to sue state officials who violate their civil rights,⁴⁹ it does not mention whether citizens can sue federal agents who violate these same rights.⁵⁰ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the United States Supreme Court created a federal right similar to the state right

⁴⁴ See *id.*; see also *Palomino v. Stanton*, No. C96-2984, 1998 WL 196461, at *3 (N.D. Cal. Apr. 21, 1998) (stating that plaintiff exhausted grievance system because prisoner appealed to director's level of review).

⁴⁵ See *Palomino*, 1998 WL 196461, at *3 (allowing prisoner's claim to proceed because prisoner exhausted all available administrative remedies); *Montez v. Swart*, No. 298-C0004, 1998 WL 158643, at *2 (N.D. Tex. Mar. 19, 1998) (stating that prisoner clearly did not exhaust prison's grievance system before filing present suit in federal court).

⁴⁶ See 42 U.S.C. § 1983 (1994). This statute says, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States . . . of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

Id.

⁴⁷ See *id.*; see also *Battaglia v. County of Schenectady*, No. 92-C1690, 1993 WL 404096, at *2 (N.D.N.Y. Sept. 29, 1993) (stating that section 1983 allows plaintiffs that meet necessary requisites to sue state officers).

⁴⁸ See 42 U.S.C. § 1983; see also *Battaglia*, 1993 WL 404096, at *3 (stating that plaintiffs can recover for state violations under section 1983); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 337 (1989) (stating that individuals can use section 1983 to vindicate constitutional wrongs state actors commit against them).

⁴⁹ See 42 U.S.C. § 1983 (stating that individuals harmed by persons acting under color of state law can seek redress).

⁵⁰ See *id.*; see also *Battaglia*, 1993 WL 404096, at *3 (holding that section 1983 does not cover violations federal officers commit); Rosen, *supra* note 48, at 337 (explaining that section 1983 allows individuals to recover constitutional deprivations committed by state actors but not those committed by federal actors).

section 1983 created.⁵¹ In *Bivens*, the plaintiff sued federal agents who unlawfully searched his apartment.⁵² The Court held that the plaintiff could recover damages for his constitutional violations by the agents, who were acting under color of federal law at the time of the search.⁵³ Thus, *Bivens* created the federal corollary to section 1983 actions;⁵⁴ although state prisoners sue prisons under section 1983, and federal prisoners sue under *Bivens*, the causes of action are basically identical.⁵⁵

B. The PLRA, 42 U.S.C. § 1997e(a): Amending Section 1997e

To ensure that prisoners exhausted the prison's administrative grievance scheme before bringing a section 1983 or *Bivens* suit, Congress enacted the PLRA.⁵⁶ The PLRA amended section 1997e, the prior version of the exhaustion requirement.⁵⁷ The amended version, section 1997e(a), provides that a prisoner must exhaust all available administrative remedies before filing a civil rights claim in federal court.⁵⁸ Before the amendment, section 1997e(a) contained three significant characteristics that the PLRA modified.⁵⁹

⁵¹ 403 U.S. 388, 397 (1971) (holding that federal officers who deprive individuals of their constitutional or federal rights could be personally liable for such deprivations).

⁵² *See id.* at 389.

⁵³ *See id.* at 397 (holding that plaintiff is entitled to recover damages from officers who violated his Fourth Amendment rights).

⁵⁴ Compare 42 U.S.C. § 1983 (allowing citizens to sue state actors that violate their constitutional rights), with *Bivens*, 403 U.S. at 397 (allowing citizens to sue federal actors who violate their constitutional rights). *See generally* Rosen, *supra* note 48, at 337 (stating that *Bivens* case created corollary to section 1983).

⁵⁵ *See* 42 U.S.C. § 1983; *Bivens*, 403 U.S. at 397; Rosen, *supra* note 48, at 337-38 (stating that section 1983 allows citizens to recover damages from state officials and that *Bivens* affords individuals same right against federal officers).

⁵⁶ *See* Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, § 101(a), 110 Stat. 1321-66 (1996); 141 CONG. REC. S14,611-01 (1995) (stating that to end frivolous prisoner litigation, prisoners must exhaust all administrative remedies before filing suit).

⁵⁷ *See* Prison Litigation Reform Act § 101(a).

⁵⁸ *See* 42 U.S.C. § 1997e(a) (Supp. III 1997).

⁵⁹ *See* 42 U.S.C. § 1997e (1994) amended by 42 U.S.C. § 1997e(a); *see also* Moore v. Smith, 18 F. Supp. 2d 1360, 1362 (N.D. Ga. 1998) (citing three characteristics of former version of 1997e that PLRA changed). The prior version, section 1997e states in relevant part:

(1) . . . in any action brought pursuant to section 1983 of this title by [a prisoner], the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available. (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in

First, the former exhaustion requirement only applied to inmates that sued under section 1983.⁶⁰ The PLRA expanded the exhaustion requirement to include prisoner suits under other federal laws.⁶¹ Most importantly, the PLRA now requires prisoners bringing *Bivens* actions to first exhaust their administrative remedies.⁶²

Second, the prior section 1997e did not require courts to dismiss inmate litigation for failure to exhaust administrative remedies.⁶³ Rather, exhaustion was discretionary.⁶⁴ Courts could invoke section 1997e when they found exhaustion appropriate and in furtherance of justice.⁶⁵

However, the amended section 1997e(a) made exhaustion mandatory rather than discretionary.⁶⁶ Congress removed the language that allowed courts to require exhaustion only if they believed doing so was appropriate.⁶⁷ Instead, Congress simply stated that a prisoner must exhaust available administrative remedies before suing in federal court.⁶⁸ Because exhaustion is no longer discretionary, section 1997e(a) requires courts to dismiss a prisoner's case if the prisoner failed to exhaust all available administrative remedies.⁶⁹

substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e.

⁶⁰ See 42 U.S.C. § 1997e; *Moore*, 18 F. Supp. 2d at 1362 (explaining that prior to PLRA, courts only applied section 1997e to prisoners that sued under section 1983).

⁶¹ See 42 U.S.C. § 1997e(a) (stating that prisoners must exhaust all available remedies before bringing suit in federal court under section 1983 or "any other Federal law").

⁶² See *id.*; see also 141 CONG. REC. H14,078-02 (1995) (statement of Mr. Lobiondo) (stating that PLRA will require all federal prisoners bringing *Bivens* actions to exhaust all administrative remedies).

⁶³ See 42 U.S.C. § 1997e; *Moore*, 18 F. Supp. 2d at 1362 (stating that courts had option to invoke section 1997e).

⁶⁴ See 42 U.S.C. § 1997e; *Moore*, 18 F. Supp. 2d at 1362 (stating that prior to PLRA, courts had discretion in deciding whether to invoke exhaustion requirement).

⁶⁵ See 42 U.S.C. § 1997e; *Moore*, 18 F. Supp. 2d at 1362 (stating that courts could invoke prior exhaustion requirement only when "interests of justice" so required).

⁶⁶ See 42 U.S.C. § 1997e(a) (stating that prisoners must exhaust their administrative remedies); *Moore*, 18 F. Supp. 2d at 1362 (observing that courts no longer have discretion in deciding whether to apply exhaustion requirement).

⁶⁷ Compare 42 U.S.C. § 1997e(a) (mandating exhaustion), with 42 U.S.C. § 1997e (giving courts discretion about exhaustion).

⁶⁸ See 42 U.S.C. § 1997e(a).

⁶⁹ See *id.*; *Moore*, 18 F. Supp. 2d at 1363 (stating that courts no longer have discretion to decide whether to require prisoners to comply with exhaustion requirement).

Section 1997e(a)'s third change eliminated a compliance provision.⁷⁰ Before the PLRA, remedies available under a prison's grievance system had to satisfy minimum standards of relief determined by the Attorney General.⁷¹ Under section 1997e(a) courts no longer have to determine whether the prison's administrative remedial scheme complies with the Attorney General's minimum standards.⁷²

Prior to the PLRA, courts did not struggle to determine when an administrative remedy existed because exhaustion was not mandatory.⁷³ If a court determined that the internal grievance procedure could not provide the relief a prisoner sought, the court could allow the case to proceed.⁷⁴ By both eliminating the minimum standards and making exhaustion mandatory, Congress appears to have compelled the courts to deny access to prisoners who have only fruitless administrative remedies to exhaust. The PLRA's amendment to section 1997e has forced courts to interpret the meaning of the word "available" as Congress used it in section 1997e(a).⁷⁵

II. STATE OF THE LAW

Congressional silence concerning the meaning of an available administrative remedy provides courts with little guidance in determining whether Congress intended to allow a futility excep-

⁷⁰ See 42 U.S.C. § 1997e(a); *Moore*, 18 F. Supp. 2d at 1363 (stating that courts no longer have to assess whether prisons' administrative grievance systems satisfy attorney general's standards because PLRA eliminated compliance provision).

⁷¹ See 42 U.S.C. § 1997e, amended by 42 U.S.C. § 1997e(a); *Moore*, 18 F. Supp. 2d at 1362 (explaining that pursuant to section 1997e Attorney General had to certify that prison satisfied certain requirements, or courts had to determine if prison met Attorney General's requirements).

⁷² See 42 U.S.C. § 1997e(a); *Moore*, 18 F. Supp. 2d at 1363 (discussing PLRA's elimination of compliance requirement).

⁷³ See 42 U.S.C. § 1997e (stating that courts could require exhaustion when justice so required). Therefore, if a prisoner sued for damages and the court believed that requiring exhaustion was not in the interest of justice, the prisoner's claim could proceed. See *id.*

⁷⁴ See *Moore*, 18 F. Supp. 2d at 1362 (explaining that courts only invoked exhaustion requirement to further interests of justice).

⁷⁵ See, e.g., *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (deciding whether prisoners who sue for damages must exhaust all available administrative remedies); *Moore*, 18 F. Supp. 2d at 1363 (discussing different applications of PLRA and rejecting view that prisoners that sue for damages do not need to exhaust all available administrative remedies); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998) (relying on cases that hold that exhaustion requirement does not apply when prison's grievance system does not provide requested relief).

tion.⁷⁶ Consequently, a three-way split of authority exists regarding whether section 1997e(a) applies to inmates that sue for damages.⁷⁷ The Ninth and Tenth Circuits have allowed a futility exception while the Sixth Circuit has not.⁷⁸ In addition, three district courts have utilized a more flexible approach when applying section 1997e(a).⁷⁹

A. Cases that Allow a Futility Exception

The Ninth and Tenth Circuits have held that section 1997e(a) only requires inmates to exhaust remedies that are actually available.⁸⁰ These circuits have concluded that prison grievance systems are not available to prisoners that sue for damages because prisons do not provide such relief.⁸¹ Although the Ninth and Tenth Circuit cases involved *Bivens* suits, several district courts have applied the

⁷⁶ See *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1202 (E.D. Cal. 1997) (stating that little existing case law interprets section 1997e(a)).

⁷⁷ Compare *Lunsford v. Jumao-As*, 155 F.3d 1178, 1178-79 (9th Cir. 1998) (allowing plaintiff's claim to proceed without exhausting all available administrative remedies because no remedies were available), with *White v. McGinnis* 131 F.3d 593, 594-95 (6th Cir. 1997) (dismissing plaintiff's complaint because plaintiff failed to comply with section 1997e(a)), and *Russo v. Palmer*, 990 F. Supp. 1047, 1051 (N.D. Ill. 1998) (dismissing plaintiff's prospective claim for failure to exhaust administrative remedies, but allowing damages claim to proceed).

⁷⁸ See *Lunsford*, 155 F.3d at 1179 (allowing plaintiff's complaint to proceed because no administrative remedies were available to him); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding that prisoners must exhaust all administrative remedies); *White*, 131 F.3d at 594-95 (requiring prisoners to prove that they exhausted all administrative remedies); *Garrett*, 127 F.3d at 1266 (holding that prisoner does not have to exhaust administrative remedies if remedies are not available).

⁷⁹ See *Russo*, 990 F. Supp. at 1051 (separating plaintiff's damages and prospective claims); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *4 (D. Kan. Aug. 14, 1998) (allowing prisoner's damages claim to proceed, but dismissing injunctive relief claim); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *6 (N.D. Ill. Feb. 10, 1998) (holding that plaintiff's damages claim may proceed, but prospective claim may not).

⁸⁰ See *Lunsford*, 155 F.3d at 1179 (holding that plaintiff had no administrative remedies to exhaust because the prison's remedies did not include monetary damages); *Garrett*, 127 F.3d at 1266 (holding that section 1997e(a) does not apply to plaintiff because no remedies are available to him).

⁸¹ See *Lunsford*, 155 F.3d at 1179 (holding that exhaustion requirement is inapplicable to prisoner that sues for damages); *Garrett*, 127 F.3d at 1266 (stating that prisoner is not required to exhaust administrative remedies because monetary remedies do not exist); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998) (holding that court will not require prisoner requesting damages to exhaust administrative remedies if no prison grievance procedure provides for monetary relief).

same reasoning to section 1983 suits and have reached the same outcome.⁸²

Garrett v. Hawk, a Tenth Circuit case, illustrates the rationale that allows a futility exception.⁸³ In *Garrett*, a prisoner brought a *Bivens* action for damages alleging that prison officials failed to provide necessary medical care and used excessive force against him.⁸⁴ The prisoner argued that because the prison did not provide monetary relief, it would be futile for the court to require him to exhaust the grievance system.⁸⁵ Nonetheless, the district court dismissed the prisoner's complaint for failure to comply with the exhaustion requirement.⁸⁶ The prisoner appealed and the Tenth Circuit reversed.⁸⁷

The Tenth Circuit analyzed whether an administrative remedy was available for the plaintiff to exhaust.⁸⁸ Because the plaintiff sought monetary relief that the internal grievance system did not provide, the court concluded that he did not have an available remedy.⁸⁹ Specifically, the court examined the prison's grievance procedures that required inmates to initially file complaints with the prison staff.⁹⁰ The prison staff had found that the prisoner's claim was not proper for administrative review because the prison's

⁸² See *Hollimon*, 6 F. Supp. 2d at 970 (stating that grievance procedure was not available to plaintiff); *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (stating that court will not require prisoner to exhaust administrative grievance system because system could not provide plaintiff with monetary relief); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (holding that plaintiff had no available remedy within prison and declining to apply section 1997e(a)); *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1208 (E.D. Cal. 1997) (holding that court does not require prisoner to exhaust prison's grievance system could not provide remedies).

⁸³ See 127 F.3d at 1266-67 (allowing prisoner's claim to proceed even though prisoner did not comply with section 1997e(a); see also *Hollimon*, 6 F. Supp. 2d at 970 (stating that administrative grievance system available to plaintiff did not provide damages and refusing to apply exhaustion requirement); *Cooper*, 1998 WL 560044, at *3 (holding that court will not require plaintiff to exhaust administrative remedies for damages); *Sanders*, 1998 WL 67615, at *6 (stating that court will not require prisoner to exhaust administrative remedies when damages provide only meaningful relief).

⁸⁴ See *Garrett*, 127 F.3d at 1264.

⁸⁵ See *id.* at 1264-65.

⁸⁶ See *id.* at 1264.

⁸⁷ See *id.* at 1267.

⁸⁸ See *id.* at 1266.

⁸⁹ See *id.*

⁹⁰ See *id.* A federal regulation governs federal prison procedures. See 28 C.F.R. § 542.10 (1999). The regulation requires prisoners to satisfy a three-step grievance procedure to reach the final administrative appeal level. See *id.*

grievance system did not award damages.⁹¹ The court concluded that although Congress intended to require prisoners to satisfy section 1997e(a), inmates can only exhaust remedies that are actually available.⁹² Accordingly, the Tenth Circuit allowed a futility exception because the plaintiff had no administrative remedies to exhaust.⁹³

Lunsford v. Jumao-As, a Ninth Circuit case, adopted *Garrett's* holding and allowed a futility exception for prisoners that sue for damages.⁹⁴ However, the *Lunsford* court narrowed this exception.⁹⁵ The court held that section 1997e(a) did not apply to the plaintiff because he sued for a past wrong and the prison only provided prospective relief.⁹⁶ Therefore, under *Lunsford*, the futility exception only applies to prisoners that sue for past wrongs.⁹⁷

Some district courts have applied the Ninth and Tenth Circuits' rationale to state prisoners' section 1983 claims.⁹⁸ Because section 1983 is the state counterpart to a *Bivens* action, courts often apply the reasoning used in *Bivens* suits to section 1983.⁹⁹ Accordingly, these district courts have concluded that section 1997e(a) is inapplicable when an inmate seeks monetary relief.¹⁰⁰

⁹¹ See *Garrett*, 127 F.3d at 1266. Because the plaintiff was only seeking damages, prison staff told him that they would reject any grievance he filed pursuant to section 542.10 because it would contain improper subject matter for administrative review. See *id.*

⁹² See *id.* at 1267.

⁹³ See *id.*

⁹⁴ 155 F.3d 1178, 1179 (9th Cir. 1998). In *Lunsford*, the plaintiff sued several prison officials who allegedly failed to provide him with timely medical attention. See *id.* After 20 months, the plaintiff finally received the corrective surgery that he needed. See *id.* Although the prison eventually treated the plaintiff, the plaintiff sued for damages because the guards failed to provide the treatment earlier. See *id.*

⁹⁵ See *id.* at 1179 (narrowing futility exception to prisoners that sue for damages and past wrongs).

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998); *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998); *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1208 (E.D. Cal. 1997).

⁹⁹ See *Marsh v. Jones*, 53 F.3d 707, 709 (5th Cir. 1995) (relying on case involving *Bivens* suit to decide prisoner's section 1983 action); *Battaglia v. County of Schenectady*, No. 92-C1690, 1993 WL 404096, at *3 (N.D.N.Y. Sept. 29, 1993) (stating that *Bivens* filled void left by section 1983).

¹⁰⁰ See, e.g., *Hollimon*, 6 F. Supp. 2d at 970 (finding section 1997e(a) inapplicable because prisoner suing for damages had no remedies available); *Jackson*, 998 F. Supp. at 904 (allowing prisoner's damages claim to proceed before prisoner exhausted section 1997e(a)).

Many of the district courts that allow a futility exception focus on the meaning of the word "available."¹⁰¹ For example, in *Lacey v. C.S.P. Solano Medical Staff*, the court looked to a dictionary to define "available."¹⁰² The dictionary defined available as, "accessible or may be obtained," and "immediately utilizable."¹⁰³ In *Lacey*, a prisoner sued the prison for damages for lack of medical attention.¹⁰⁴ Based on the dictionary definition, the court decided that an available remedy was one that could provide the prisoner with relief.¹⁰⁵ Like the *Garrett* court, the *Lacey* court allowed the prisoner's claim to proceed without the prisoner exhausting his administrative remedies.¹⁰⁶

Thus, the *Garrett* approach provides a futility exception for prisoners that sue for damages.¹⁰⁷ Courts that use this approach do not apply section 1997e(a) to inmates' suits for such relief.¹⁰⁸ This approach allows inmates that sue for damages to sue in federal court without complying with section 1997e(a) because they have no available remedies to exhaust.¹⁰⁹

¹⁰¹ See *Hollimon*, 6 F. Supp. 2d at 970 (noting that administrative scheme available to plaintiff did not award damages); *Jackson*, 998 F. Supp. at 904 (excusing exhaustion requirement because Illinois grievance system did not provide monetary relief and no other relief was available to plaintiff); *Freeman*, 996 F. Supp. at 825 (holding that prospective relief was not available remedy for prisoner's past injury); *Lacey*, 990 F. Supp. at 1205 (explaining that prison's grievance system was not available to plaintiff because it could not provide him with relief).

¹⁰² See 990 F. Supp. at 1205 (giving dictionary definition of available because "available" is key word in exhaustion requirement).

¹⁰³ See *id.* (quoting WEBSTER'S NEW INT'L DICTIONARY 150 (3d ed. 1976)).

¹⁰⁴ See *id.* at 1201.

¹⁰⁵ See *id.* at 1205.

¹⁰⁶ See *id.* (stating that prison's grievance system lacks authority to provide prisoner with requested relief, so system cannot be used to accomplish purpose of his suit).

¹⁰⁷ See, e.g., *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (holding that court does not require prisoner suing for damages to comply with section 1997e(a) because grievance system only provides prospective relief); *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (holding that prisoner does not have to exhaust prison's grievance system because no remedies exist for particular prisoner); *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998) (noting that many courts excuse exhaustion requirement when prisoners sue for monetary relief because prison grievance systems do not provide damages).

¹⁰⁸ See, e.g., *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998) (stating that administrative grievance system available to plaintiff does not provide damages so exhaustion requirement is not applicable); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (holding that grievance procedure could not redress plaintiff's injury because plaintiff was suing for damages and grievance system only provided prospective relief).

¹⁰⁹ See *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1205 (E.D. Cal. 1997) (explaining that court will not require prisoner that sues for damages to exhaust grievance system because prospective relief is not available to prisoners that sue for damages).

B. Cases that Strictly Adhere to the Exhaustion Requirement

In contrast to the *Garrett* approach, the Sixth Circuit has rejected inmates' futility arguments.¹¹⁰ Under this approach, if prisoners fail to satisfy section 1997e(a), these courts will dismiss the entire complaint,¹¹¹ even when they seek damages.¹¹² These courts state that a different interpretation of section 1997e(a) would sanction prisoners' evasion of the PLRA's exhaustion requirement.¹¹³

Brown v. Toombs, a Sixth Circuit case, illustrates this strict approach.¹¹⁴ In *Brown*, a prisoner sued under section 1983 challenging prison conditions, including lack of medical treatment and denial of food and water.¹¹⁵ The district court dismissed the plaintiff's suit for failure to exhaust all available administrative remedies.¹¹⁶

The Sixth Circuit affirmed, stating that courts must strictly adhere to section 1997e(a) to reap the numerous and substantial benefits that the PLRA provides.¹¹⁷ According to the Sixth Circuit,

¹¹⁰ See *Brown v. Toombs*, 139 F.3d 1102, 1103 (6th Cir. 1998) (holding that court will not hear merits of prisoner's case unless prisoner satisfies section 1997e(a)); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1998) (stating that plaintiff's futility allegation was conclusory and unconvincing). Some district courts have also rejected inmates' futility arguments. See *Bearden v. Godfrey*, C98-2294, 1998 WL 456294, at *1 (N.D. Cal. July 27, 1998) (rejecting prisoner's claim that section 1997e(a) cannot apply to him because he was suing for damages); *Allen v. Sanders*, No. 298-C0065, 1998 WL 318841, at *1 (N.D. Tex. June 4, 1998) (dismissing plaintiff's damages complaint because plaintiff failed to exhaust all available administrative remedies).

¹¹¹ See, e.g., *White*, 131 F.3d at 595 (dismissing complaint because plaintiff failed to prove that administrative remedies were inadequate); *Moore*, 18 F. Supp. 2d at 1364 (stating that prisoner's futility claim was unpersuasive).

¹¹² See, e.g., *White*, 131 F.3d at 594 (rejecting argument that plaintiff does not have to exhaust all available administrative remedies because plaintiff was suing for damages); *Moore*, 18 F. Supp. 2d at 1364 (disagreeing with courts that allow futility exception, and giving five reasons why inmates that sue for damages must comply with exhaustion requirement); *Alexandroai v. California Dep't of Corrections*, 985 F. Supp. 968, 970 (S.D. Cal. 1997) (dismissing plaintiff's complaint for damages because plaintiff failed to comply with section 1997e(a) before suing in federal court).

¹¹³ See *Brown*, 139 F.3d at 1103 (stating that prisons have interest in not allowing prisoner to bypass exhaustion); *Moore*, 18 F. Supp. 2d at 1364 (explaining that if section 1997e(a) does not apply to prisoners that sue for damages, prisoners can easily avoid exhaustion requirement by adding damages request); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *6 (N.D. Ill. Feb. 10, 1998) (stating that Tenth Circuit's rationale is too broad because almost all complaints have damages request).

¹¹⁴ See 139 F.3d at 1104 (holding that courts should strictly interpret exhaustion requirement).

¹¹⁵ See *id.* at 1102.

¹¹⁶ See *id.* at 1104.

¹¹⁷ See *id.* at 1103 (recognizing that one benefit allows prisons to efficiently correct and handle prisoner complaints).

the exhaustion requirement allows those with expertise in day-to-day prison management to resolve internal problems in an efficient manner.¹¹⁸ This comports with Congress's goal to restrict federal interference in prison management.¹¹⁹ Therefore, the Sixth Circuit refused to allow a futility exception.¹²⁰

C. Cases that Apply a Flexible Approach to Section 1997e(a)

Recently, three district courts have combined the Tenth Circuit's approach in *Garrett*, and the Sixth Circuit's approach in *Brown*.¹²¹ These courts have developed a more flexible interpretation of what constitutes an available administrative remedy.¹²² Courts that utilize this third approach distinguish between a plaintiff's request for monetary and prospective relief when applying section 1997e(a).¹²³ These courts hold that the exhaustion requirement is not absolute.¹²⁴

¹¹⁸ See *id.*

¹¹⁹ See 141 CONG. REC. S14,408-01 (1995) (statement of Sen. Dole) (stating that Congress designed PLRA to decrease judicial micromanagement of prisons); see also Kuzinski, *supra* note 8, at 373 (stating that Congress intended PLRA to restrain judicial interference prison management). Other courts that agree with the Sixth Circuit's rationale similarly adhere to a strict interpretation of the exhaustion requirement. See, e.g., *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998) (disagreeing with courts that allow futility exception for prisoners suing for money); *Pinkston-El v. Washington*, No. 97-C8924, 1998 WL 293196, at *7 (N.D. Ill. May 22, 1998) (dismissing plaintiff's case because prisoner did not exhaust all available administrative remedies); *Delgado v. Randall County*, No. 298-C0055, 1998 WL 159937, at *1-2 (N.D. Tex. Mar. 31, 1998) (barring plaintiff's suit because plaintiff failed to satisfy section 1997e(a)); *Montez v. Swart*, No. 298-C0004, 1998 WL 158643, at *2 (N.D. Tex. Mar. 19, 1998) (holding that exhaustion requirement is mandatory and court must dismiss plaintiff's complaint because plaintiff failed to comply with statute). These courts have held that the plain language of the statute, coupled with Congress's intent in enacting the PLRA, requires prisoners to exhaust all available administrative remedies, even if they are futile. See, e.g., *Montez*, 1998 WL 158643, at *2. If a prisoner fails to comply with section 1997e(a), the court will dismiss the entire complaint. See *id.*

¹²⁰ See *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding that prisoners filing section 1983 suits must allege and show compliance with section 1997e(a)).

¹²¹ See *Russo v. Palmer*, 990 F. Supp. 1047, 1050 (N.D. Ill. 1998) (dismissing plaintiff's request for prospective relief due to failure to exhaust, but allowing claim for damages to remain); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (allowing prisoner's damages claim to proceed, but dismissing prospective claim); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *5 (N.D. Ill. Feb. 10, 1998) (allowing damages request to proceed, but dismissing prospective claim).

¹²² See *Cooper*, 1998 WL 560044 at *3.

¹²³ See *id.*; see also *Pratt v. Hurley*, 79 F.3d 601, 603 (7th Cir. 1996) (providing that when prisoner sues for both monetary and prospective relief, district court has option to consider damages request and dismiss prospective relief claim).

¹²⁴ See *Russo*, 990 F. Supp. at 1050; *Cooper*, 1998 WL 560044, at *3; *Sanders*, 1998 WL 67615, at *5.

Sanders v. Elyea, a district court case, illustrates this flexible approach.¹²⁵ In *Sanders*, the plaintiff sued for both monetary and prospective relief under section 1983 for inadequate medical care.¹²⁶ After the plaintiff sued, the prison treated his medical condition.¹²⁷

Under the *Garrett* approach, section 1997e(a)'s exhaustion requirement would not attach to the prisoner's claim for either damages or prospective relief.¹²⁸ The *Sanders* court agreed with *Garrett* in part, holding that section 1997e(a) did not apply to the prisoner's damage claim because the prison's grievance system did not provide for damages.¹²⁹ However, the *Sanders* court refused to apply the futility exception to the claim for prospective relief.¹³⁰

The *Sanders* court held that section 1997e(a) applied to the prospective relief claim because this relief was available when the prisoner filed his suit.¹³¹ However, because the prison treated the prisoner's medical condition after the prisoner sued, prospective relief was no longer available.¹³² Nonetheless, the *Sanders* court stated that even if the prison had not yet provided medical care, the court still would have dismissed the prisoner's prospective claim.¹³³

The *Sanders* approach allows courts to separate the various claims in a prisoner's complaint.¹³⁴ A prisoner suing for prospective and

¹²⁵ See 1998 WL 67615, at *5 (stating that courts should apply exhaustion requirement flexibly).

¹²⁶ See *id.* at *1.

¹²⁷ See *id.* at *3.

¹²⁸ See *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (allowing plaintiff's suit for injunction and damages to proceed); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970-71 (N.D. Ill. 1998) (allowing plaintiff's complaint to proceed in its entirety).

¹²⁹ See *Sanders*, 1998 WL 67615, at *6 (holding that administrative remedy was not available to plaintiff because it could not provide plaintiff with relief); see also *Russo*, 990 F. Supp. at 1050 (stating that prison's administrative grievance system is not available to plaintiff's damages claim); *Cooper*, 1998 WL 560044, at *2 (stating that court does not require plaintiff to exhaust administrative remedies when plaintiff is seeking monetary relief).

¹³⁰ See *Sanders*, 1998 WL 67615, at *6 (stating that *Garrett's* holding is too broad and that prisoner must comply with section 1997e(a) because administrative procedure provides relief).

¹³¹ See *id.*

¹³² See *id.* at *4.

¹³³ See *id.* at *5 (stating that if damages award constitutes prisoner's only meaningful relief, exhaustion does nothing but delay prisoner's claim). *But see* *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) (holding that court requires plaintiff to exhaust administrative remedies before suing in federal court); *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998) (dismissing prisoner's suit for both prospective and monetary relief for failure to exhaust administrative remedies).

¹³⁴ See, e.g., *Russo*, 990 F. Supp. at 1050 (dismissing plaintiff's request for prospective relief for failure to exhaust, but allowing damages claim to proceed); *Cooper*, 1998 WL 560044, at *3 (holding that only plaintiff's damages request may remain in federal court);

monetary relief who has not exhausted the prison's grievance system provides an example of how approach works.¹³⁵ Under *Sanders*, a court can dismiss the prisoner's prospective claim but allow the damages claim to proceed,¹³⁶ while under the *Garrett* or *Brown* approaches, when an inmate does not comply with section 1997e(a), the court must either dismiss the inmate's entire complaint or allow the entire complaint to proceed.¹³⁷

III. ANALYSIS

Garrett, *Brown*, and *Sanders* represent the three approaches that courts have used to determine whether a futility exception should exist.¹³⁸ The *Garrett* approach allows prisoners to sue for damages before they exhaust all available administrative remedies.¹³⁹ In contrast, the *Brown* approach requires prisoners to exhaust all administrative remedies regardless of the nature of their claims.¹⁴⁰ Finally, the *Sanders* approach applies a more flexible standard to the exhaustion requirement.¹⁴¹ Each approach includes both beneficial and negative aspects.¹⁴²

Sanders, 1998 WL 67615, at *5 (allowing damages request to proceed but dismissing prospective claim);

¹³⁵ See *Sanders*, 1998 WL 67615, at *3 (involving prisoner that sued for both damages and injunction and failed to comply with section 1997e(a)).

¹³⁶ See *Russo*, 990 F. Supp. at 1050 (separating prisoner's claim by only allowing damages claim to proceed); see also *Sanders*, 1998 WL 67615, at *5 (allowing damages claim to proceed).

¹³⁷ See *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 968 (N.D. Ill. 1998) (allowing plaintiff's complaint to proceed in its entirety); see also *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (explaining approach); *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (outlining ruling).

¹³⁸ See *Brown*, 139 F.3d at 1104 (dismissing prisoner's suit for failure to exhaust all available administrative remedies); *Garrett*, 127 F.3d at 1267 (holding that prisoner can only exhaust remedies that are actually available); *Sanders*, 1998 WL 67615, at *6 (allowing prisoner's damages, but not prospective claim, to proceed).

¹³⁹ See *Garrett*, 127 F.3d at 1267 (holding that prisoners can only exhaust remedies that are actually available).

¹⁴⁰ See *Brown*, 139 F.3d at 1104 (dismissing prisoner's claim for failure to exhaust all available administrative remedies).

¹⁴¹ See *Sanders*, 1998 WL 67615, at *6 (dismissing prisoner's prospective claim, but allowing damages claim to proceed).

¹⁴² See *Brown*, 139 F.3d at 1104 (requiring prisoners to exhaust administrative grievance system even if doing so is futile); *Garrett*, 127 F.3d at 1267 (allowing prisoner's damages claims to proceed in court before prisoner has complied with section 1997e(a)); *Sanders*, 1998 WL 67615, at *6 (allowing damages claim to proceed in federal court even if prisoner did not exhaust all available administrative remedies).

A. Rationales that Support a Futility Exception

The Ninth and Tenth Circuits have held that inmates can only exhaust an administrative remedy that is actually available.¹⁴³ This approach has several positive aspects. First, courts that utilize the *Garrett* approach are fair to inmates because prisons do not provide monetary relief.¹⁴⁴ Therefore, courts that excuse the exhaustion requirement when inmates sue for money provide inmates with potential relief.¹⁴⁵ If prisoners' claims can be cured only with monetary relief, courts should not require prisoners to futilely exhaust a prison grievance system that only provides prospective relief.¹⁴⁶

Second, the *Garrett* approach focuses on the plain meaning of the word "available," which comports with a strict constructionist statutory analysis.¹⁴⁷ Using this analysis, a court interpreting a statute begins its inquiry by analyzing the statute's plain language.¹⁴⁸ If the statute fails to define its terms, a court should assume that Congress intended to give those terms their ordinary meaning.¹⁴⁹

Section 1997e(a) does not define its terms.¹⁵⁰ Therefore, under a strict constructionist analysis courts should give the exhaustion requirement's terms their ordinary meaning.¹⁵¹ The *Lacey* court stated that "available" was the critical word in the exhaustion re-

¹⁴³ See, e.g., *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (holding that exhaustion requirement does not apply to prisoner suing for damages); *Garrett*, 127 F.3d at 1266 (stating that court will not require prisoner suing for damages to exhaust administrative remedies because remedies would not actually remedy the situation).

¹⁴⁴ See, e.g., *Garrett*, 127 F.3d at 1267 (stating that administrative system could not provide plaintiff with monetary damages); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998) (stating that prison's grievance system does not provide monetary damages).

¹⁴⁵ See *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (holding that requiring plaintiff to exhaust administrative remedies is futile when no administrative remedy exists); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (stating that grievance procedure cannot compensate plaintiff so court should not require exhaustion); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (stating that dismissing plaintiff's damages claim puts plaintiff at risk of losing claim on statute of limitation grounds).

¹⁴⁶ See *Sanders*, 1998 WL 67615, at *6 (stating that courts that require prisoner to exhaust grievance system in vain only delay prisoner's claim).

¹⁴⁷ See *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1204 (E.D. Cal. 1997) (explaining that when courts interpret statute, inquiry begins with language of statute and courts should read statute as whole).

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See 42 U.S.C. § 1997e(a) (Supp. III 1997).

¹⁵¹ See *Lacey*, 990 F. Supp. at 1204 (stating that Congress did not define exhaustion requirement's terms so courts should give them their ordinary meaning).

quirement and looked to a dictionary for its plain meaning.¹⁵² Using this interpretation of available, the *Garrett* approach does not require prisoners to exhaust their administrative remedies when such remedies do not exist.¹⁵³

On the other hand, one flaw of the *Garrett* approach is that it undermines Congress's intent in passing the PLRA.¹⁵⁴ The underlying purpose of the PLRA is to discourage prisoner litigation and to prevent the federal courts from interfering in actions that prisons themselves can remedy.¹⁵⁵ Under *Garrett*, if prisoners sue for damages, their entire complaint can proceed in federal court before they satisfy section 1997e(a).¹⁵⁶ Prisoners can easily add a damages request to any complaint.¹⁵⁷ In fact, most complaints contain a damages demand.¹⁵⁸ This allows prisoners to evade the exhaustion requirement,¹⁵⁹ and substantially limits the effectiveness of section 1997e(a).¹⁶⁰

¹⁵² See *id.* at 1205 (stating that key word in section 1997e(a) is "available" and focus must be on plain meaning of that word).

¹⁵³ See, e.g., *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (holding that court will not require prisoner suing for damages for past wrong to comply with section 1997e(a) because prison's grievance system only provides prospective relief); *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (holding that court does not require prisoner to exhaust prison's grievance system because no remedies are available). Before the PLRA amended the statute, courts did not consider state administrative systems that did not provide damages as providing "available" remedies under section 1997e. See *Lacey*, 990 F. Supp. at 1205 n.8.

¹⁵⁴ See *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *6 (N.D. Ill. Feb. 10, 1998) (stating that *Garrett's* holding is too broad because allowing prisoner's claim to proceed without exhaustion limits exhaustion requirement).

¹⁵⁵ See 141 CONG. REC. S14611-01 (1995); see also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 13, 16 (1997) (discussing Congress's two underlying goals in enacting PLRA); Kuzinski, *supra* note 8, at 368-80 (stating that PLRA addresses dual problems of excessive inmate litigation and judicial micro-management of prisons).

¹⁵⁶ See *Lunsford*, 155 F.3d at 1179 (holding that exhaustion requirement does not apply to prisoner suing for damages); *Garrett*, 127 F.3d at 1266 (stating that court does not require prisoner to exhaust administrative remedies because monetary remedy does not exist).

¹⁵⁷ See *Moore v. Smith*, 18 F. Supp. 2d 1360, 1364 (N.D. Ga. 1998) (stating that prisoners can avoid section 1997e(a) by adding damages request to their claim).

¹⁵⁸ See *id.* at 1364 n.4 (stating that almost all prisoner complaints before court have damages claim); *Sanders*, 1998 WL 67615, at *6 (stating that virtually all prisoner suits demand damages).

¹⁵⁹ See *Moore*, 18 F. Supp. 2d at 1364 (stating that if courts do not require exhaustion, inmates can easily avoid section 1997e(a) by adding damages request to their complaint).

¹⁶⁰ See *id.*

B. Rationales that Oppose a Futility Exception

While the *Garrett* approach allows a futility exception for prisoners that sue for damages, the *Brown* approach strictly interprets section 1997e(a) and rejects a futility exception.¹⁶¹ This strict interpretation has several positive aspects. For example, the language of the section, taken as a whole, supports such an interpretation.¹⁶² As the *Brown* court stated, the statute's language requires courts to dismiss prisoners' claims if they did not comply with the section.¹⁶³

Instead of focusing on the word "available," the *Brown* court's approach focuses on the section in its entirety.¹⁶⁴ Specifically, the *Brown* court emphasized that section 1997e(a) states that "no action shall be brought" until prisoners have exhausted all available administrative remedies.¹⁶⁵ Further, the court reasoned that the section's language is explicit and contains no exceptions.¹⁶⁶ In particular, the section contains no condition regarding the type of relief that prisoners may request.¹⁶⁷ Therefore, to comply with section 1997e(a) the *Brown* approach requires prisoners to exhaust the prison's grievance system regardless of the relief they seek.¹⁶⁸

¹⁶¹ See *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (stating that in accordance with plain language of statute, inmates must allege and show that they have satisfied exhaustion requirement before bringing section 1983 suit in federal court); see also *Garrett*, 127 F.3d at 1267 (explaining holding).

¹⁶² See *Moore*, 18 F. Supp. 2d at 1364 (holding that language of section 1997e(a) does not require courts to evaluate sufficiency of remedies).

¹⁶³ See *Brown*, 139 F.3d at 1104 (stating that Sixth Circuit will not decide prisoner's case on merits if prisoner does not adhere to exhaustion requirement).

¹⁶⁴ See, e.g., *Moore*, 18 F. Supp. 2d at 1364 (disagreeing with *Garrett* line of reasoning because statute does not provide qualification regarding relief prisoner requests).

¹⁶⁵ See 42 U.S.C. § 1997e(a) (Supp. III 1997); *Brown*, 139 F.3d at 1104 (quoting 42 U.S.C. § 1997e(a)); see also *Moore*, 18 F. Supp. 2d at 1364 (stating that plain language of statute only requires prisoners to exhaust administrative remedies, regardless of whether these remedies will produce result prisoner requested).

¹⁶⁶ See 42 U.S.C. § 1997e(a); *Brown*, 139 F.3d at 1104 (stating that courts should interpret statute to mean exactly what Congress intended — that federal courts should not decide merits of prisoners' claims until prisoners exhaust all administrative remedies).

¹⁶⁷ See 42 U.S.C. § 1997e(a); *Moore*, 18 F. Supp. 2d at 1364 (stating that section 1997e(a) is not conditioned on type of relief prisoner requests).

¹⁶⁸ See *Brown*, 139 F.3d at 1104 (holding that prisoner suing for damages must exhaust all administrative remedies in light of statute's plain language); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) (dismissing complaint because plaintiff failed to prove that administrative remedies were inadequate); *Moore*, 18 F. Supp. 2d at 1364 (stating that prisoner's futility claim is unpersuasive); *Allen v. Sanders*, No. 298-C0065, 1998 WL 318841, at *1 (N.D. Tex. June 4, 1998) (dismissing plaintiff's complaint for damages because plaintiff failed to exhaust all available administrative remedies).

To further support this interpretation, many courts that utilize the *Brown* approach compare the language of the prior and amended versions of the exhaustion requirement.¹⁶⁹ Specifically, when Congress amended section 1997e, it deleted the word “effective” from the phrase addressing administrative remedies but retained the word “available.”¹⁷⁰ Thus, the plain language of section 1997e(a) suggests that Congress requires prisoners to exhaust all available administrative remedies, regardless of whether these remedies are effective.¹⁷¹

In addition, *Brown* strictly applied section 1997e(a) to comport with Congress’s desire to reduce inmate litigation and relieve the federal courts.¹⁷² The *Brown* approach requires prisoners to satisfy section 1997e(a) regardless of their requests for relief.¹⁷³ Therefore, prisoners cannot circumvent the exhaustion requirement by requesting damages.¹⁷⁴ Furthermore, if the prison system itself is able to remedy some prisoners’ complaints, the federal judiciary’s caseload may decrease.¹⁷⁵

Despite these benefits, this strict interpretation may leave prisoners without a remedy.¹⁷⁶ *Brown* encouraged courts to dismiss prisoners’ claims when they failed to satisfy section 1997e(a).¹⁷⁷ However, this delay may jeopardize the prisoners’ chances to sue in

¹⁶⁹ See, e.g., *Moore*, 18 F. Supp. 2d at 1362-63 (discussing changes PLRA made to section 1997e); see also *Brown*, 139 F.3d at 1104 (explaining ruling).

¹⁷⁰ Compare 42 U.S.C. § 1997e(a) (stating that prisoners must exhaust all available administrative remedies), with 42 U.S.C. § 1997e (1994), amended by 42 U.S.C. 1997e(a) (stating that when appropriate, courts should require prisoners to exhaust effective administrative remedies).

¹⁷¹ See *Moore*, 18 F. Supp. 2d at 1364 (stating that section 1997e(a) requires that courts determine only that administration system is available, and not sufficiency of system).

¹⁷² See 141 CONG. REC. S74,498-01 (1995) (statement of Sen. Kyle) (stating that underlying purpose of PLRA is to decrease prisoner litigation and judicial micromanagement of prisons). See generally *Brown*, 139 F.3d at 1103 (noting that before exhaustion requirement federal courts took thousands of prisoners’ suits and appeals).

¹⁷³ See *Brown*, 139 F.3d at 1104 (holding that prisoner must exhaust all administrative remedies before suing for damages.)

¹⁷⁴ See *Moore*, 18 F. Supp. 2d at 1364 (discussing possibility of prisoner evading section 1997e(a) by requesting damages).

¹⁷⁵ See *id.* (stating that if prison resolves prisoners’ complaints, prisoners will file fewer cases in federal court).

¹⁷⁶ See *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *5 (N.D. Ill. Feb. 10, 1998) (stating that when prisoners sue for damages, exhaustion does nothing but delay claim).

¹⁷⁷ See *Brown*, 139 F.3d at 1104 (stating that courts should dismiss prisoners’ appeals without prejudice when prisoners fail to exhaust administrative remedies).

federal court in the future.¹⁷⁸ Because exhausting the prison's grievance system is a lengthy and time-consuming process, courts might later bar prisoners' suits on statute of limitation grounds.¹⁷⁹

Moreover, this strict interpretation fails to address the plain meaning of the word "available" as a dictionary defines it.¹⁸⁰ The *Brown* approach focuses on the administrative grievance system's availability to prisoners that sue for money.¹⁸¹ Specifically, if prisoners can file a grievance with the prison, *Brown* concludes that they have an available remedy.¹⁸² Under the *Brown* approach, if the prison has a redress mechanism, the system is "available" regardless of whether it provides the prisoner with effective relief.¹⁸³ Therefore, the *Brown* approach is inadequate.¹⁸⁴ While this approach furthers Congress's goal of reducing prisoner litigation, it does not allow courts to remedy many wrongs that prisoners suffer.¹⁸⁵

C. Rationales that Support a Flexible Approach to Section 1997e(a)

The *Sanders* approach applies section 1997e(a) flexibly by requiring exhaustion for prospective but not monetary relief when a prisoner sues for both.¹⁸⁶ This approach is consistent with Con-

¹⁷⁸ See *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (citing Supreme Court precedent that dismissing prisoner's damages complaint is unnecessary, inefficient, and places prisoner at risk of losing claim on limitations grounds).

¹⁷⁹ See *id.*

¹⁸⁰ See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 861 (9th ed. 1985) (defining "available"); see also *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1205 (E.D. Cal. 1997) (giving "available" its plain meaning).

¹⁸¹ See *Brown*, 139 F.3d at 1104 (explaining holding); *Bearden v. Godfrey*, No. C98-2294, 1998 WL 456294, at *1 (N.D. Cal. July 27, 1998) (stating that administrative grievance system is available to plaintiff because prisoner's claim concerns prison conditions).

¹⁸² See *Brown*, 139 F.3d at 1104 (holding that prisoner suing for damages must first exhaust administrative remedies.)

¹⁸³ See *Moore v. Smith*, 18 F. Supp. 2d 1360, 1364 (N.D. Ga. 1998) (stating that Congress did not ask courts to evaluate sufficiency of administrative remedy); *Bearden*, 1998 WL 456294, at *1 (stating that prisoner must exhaust prison's grievance procedure even if prisoner cannot obtain remedy from prison).

¹⁸⁴ See *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (stating that dismissing prisoner's damages complaint is unnecessary, inefficient, and places prisoner at risk of losing claim on limitation grounds).

¹⁸⁵ See *id.* (stating that prisoners that sue for damages risk losing their claims if courts require them to exhaust administrative remedies); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *5-6 (N.D. Ill. Feb. 10, 1998) (stating that requiring prisoner suing for damages to exhaust administrative remedies only delays prisoner's claim).

¹⁸⁶ See *Russo v. Palmer*, 990 F. Supp. 1047, 1050 (N.D. Ill. 1998) (allowing damages claim to proceed but dismissing claim for prospective relief); *Cooper*, 1998 WL 560044, at *3 (allowing futility exception for prisoner's damages claim, but not for prospective relief claim);

gress's intent in passing the PLRA.¹⁸⁷ Congress passed the PLRA to reduce prisoner litigation.¹⁸⁸ Because the *Sanders* approach requires prisoners to exhaust their administrative remedies for prospective relief, the amount of prisoner litigation in the federal courts may decrease.¹⁸⁹ If the prison's grievance system can correct the wrong, the prisoner no longer needs to seek redress in federal court.¹⁹⁰

Moreover, this flexible approach comports with the plain meaning of the exhaustion requirement itself.¹⁹¹ Like section 1997e(a), *Sanders* requires prisoners to exhaust all available administrative remedies.¹⁹² Therefore, prisoners must exhaust all prospective claims because prisons provide prospective relief as an administrative remedy.¹⁹³

However, the *Sanders* approach also contains flaws.¹⁹⁴ To date, courts have only applied this third approach to suits for both monetary and prospective relief.¹⁹⁵ *Sanders* only dismissed the prisoner's prospective claim.¹⁹⁶ Therefore, this approach allows pris-

Sanders, 1998 WL 67615, at *6 (dismissing plaintiff's prospective claim for failure to comply with section 1997e(a) while allowing damages claim to proceed).

¹⁸⁷ See 141 CONG. REC. S14,611-01 (1995) (introducing PLRA as legislation that will decrease inmate litigation and judicial interference in prison management); see also *Sanders*, 1998 WL 67615, at *5 (stating that flexible definition of what constitutes administrative remedy gives effect to Congress's intent in passing PLRA).

¹⁸⁸ See 141 CONG. REC. S14,611-01 (1995) (introducing PLRA as legislation that will do away with frivolous prisoner lawsuits).

¹⁸⁹ See *Sanders*, 1998 WL 67615, at *5 (stating that Congress intended to reduce prisoner litigation and flexible approach comports with that goal).

¹⁹⁰ See *Moore v. Smith*, 18 F. Supp. 2d 1360, 1364 (N.D. Ga. 1998) (stating that every grievance prison resolves is one fewer case in federal judiciary).

¹⁹¹ See *Sanders*, 1998 WL 67615, at *4-5 (stating that flexible interpretation comports with plain meaning of "remedy").

¹⁹² See *id.* at *6 (stating that prisoner is required to exhaust administrative remedy to extent that meaningful relief is available).

¹⁹³ See *id.* at *5 (requiring prisoner to exhaust his prospective claim because administrative remedies could provide meaningful relief); see also *Russo v. Palmer*, 990 F. Supp. 1047, 1050 (N.D. Ill. 1998) (stating that administrative remedies were available for prisoner's prospective relief claim); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (stating that court lacks authority to decide prisoner's prospective claim because prisoner failed to comply with section 1997e(a)).

¹⁹⁴ See *Moore*, 18 F. Supp. 2d at 1364 (stating that if courts condition exhaustion requirement on whether prisoner can obtain relief, prisoner can easily avoid statute by including damages claim).

¹⁹⁵ See, e.g., *Russo*, 990 F. Supp. at 1048 (involving prisoner that requested prison transfer, restoration of his good-time credits, and monetary relief); *Cooper*, 1998 WL 560044, at *3 (involving prisoner that sought prospective relief, as well as compensatory and punitive damages).

¹⁹⁶ See *Sanders*, 1998 WL 67615, at *5 (allowing prisoner's damages claim to proceed).

oners that fail to exhaust the prison's grievance system to avoid the exhaustion requirement by adding a damages request to their claim.¹⁹⁷ Prisoners may strategically add a damages claim to their complaint, even if they are suing for ongoing wrongs.¹⁹⁸ This tactic circumvents the congressional goal of sharply truncating frivolous suits by prisoners.¹⁹⁹

IV. PROPOSED SOLUTION

Each of the three approaches that courts currently use to interpret section 1997e(a) contains flaws.²⁰⁰ Courts can remedy these flaws if they allow a futility exception to section 1997e(a) for prisoners that sue exclusively for damages based on past wrongs.²⁰¹ This approach balances congressional intent, the plain meaning of the exhaustion requirement, and fairness to prisoners.²⁰²

A futility exception for prisoners that sue for damages for past wrongs solves the problems of the three current approaches.²⁰³ For example, the *Garrett* approach allows prisoners to evade the exhaustion requirement by suing for damages.²⁰⁴ In contrast, the *Brown* approach requires prisoners to exhaust administrative sys-

¹⁹⁷ See *Moore*, 18 F. Supp. 2d at 1364 (stating that if courts condition section 1997(a) on whether prisoners can obtain requested relief, prisoners could easily avoid statute by suing for damages); *Sanders*, 1998 WL 67615, at *5 (stating that allowing prisoners' claims to proceed without exhaustion because of damages claim limits section 1997e(a)).

¹⁹⁸ See, e.g., *Moore*, 18 F. Supp. 2d at 1364 (illustrating that prisoners can avoid exhaustion requirement if courts allow all damages claims to proceed in court before exhaustion is complete).

¹⁹⁹ See *id.*

²⁰⁰ See *Cooper*, 1998 WL 560044, at *3 (citing *Pratt v. Federal Bureau of Prisons*, 79 F.3d 601, 603 (7th Cir. 1996), and stating that dismissing prisoners' damages complaints is unnecessary, inefficient, and places prisoner at risk of losing claim on limitations grounds); *Sanders*, 1998 WL 67615, at *6 (stating that *Garrett's* holding is too broad because allowing prisoners' claims to proceed without exhaustion just because of relief they request limits statute).

²⁰¹ Cf. *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (allowing prisoner's claim to proceed because damages at issue were for past wrong); *Sanders*, 1998 WL 67615, at *5 (stating that courts should balance competing concerns when applying section 1997e(a)).

²⁰² Cf. *Sanders*, 1998 WL 67615, at *5 (stating that courts should balance congressional intent with prisoners' rights when applying exhaustion requirement).

²⁰³ Cf. *id.* (stating that when damages provide prisoner with only meaningful relief, courts should not rigidly apply section 1997e(a)).

²⁰⁴ See *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (allowing prisoners that sue for damages to sue in federal court before satisfying section 1997e(a)); see also *Sanders*, 1998 WL 67615, at *5-6 (criticizing *Garrett* for allowing prisoners to avoid exhaustion requirement merely by suing for damages).

tems that cannot provide them with relief.²⁰⁵ Although the *Sanders* approach appears to reach a middle ground, prisoners can always add a damages claim to their complaint to proceed without complying with section 1997e(a).²⁰⁶

A futility exception for prisoners' damages claims for past wrongs, alleviates the *Garrett* and *Sanders* problem of prisoners that evade the exhaustion requirement by requesting damages.²⁰⁷ This futility exception requires prisoners to comply with section 1997e(a) if an administrative remedy is available, even if the prisoner did not request the remedy.²⁰⁸ For example, an inmate that needs medical care may only sue for damages.²⁰⁹ However, the prison's grievance system could order a doctor to treat the inmate.²¹⁰ Prospective relief is an available remedy for the inmate, even though the inmate only requested money, because the wrong continues to occur.²¹¹ Therefore, inmates that sue for ongoing wrongs cannot avoid the exhaustion requirement by adding a damages request to their claim.²¹² Any suit based on an ongoing wrong, regardless of the remedy sought, would have to proceed through the administrative process.²¹³

In contrast, prisoners that sue for past wrongs may seek prospective relief.²¹⁴ For example, if a guard beats a prisoner, the prisoner

²⁰⁵ See *Brown v. Toombs*, 139 F.3d 1102, 1104 (dismissing prisoners suit for failure to exhaust administrative remedies); see also *Sanders*, 1998 WL 67615, at *5 (stating that Congress did not intend to require prisoners to exhaust procedures that cannot provide effective relief).

²⁰⁶ See *Sanders*, 1998 WL 67615, at *5-6 (dismissing prisoner's prospective relief claim, and declining to dismiss prisoner's monetary claim); see also *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998) (stating that prisoners can easily avoid exhaustion requirement by requesting damages if courts allow damages claims to proceed before prisoners satisfy section 1997e(a)).

²⁰⁷ See *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (allowing futility exception for prisoners suing for past wrongs).

²⁰⁸ Cf. *Pinkston-El v. Washington*, No. 97-C8924, 1998 WL 293196, at *7 (N.D. Ill. May 22, 1998) (dismissing prisoner's damages claim because administrative remedy was available even though prisoner did not sue for this remedy).

²⁰⁹ See *Alexandroai v. California Dep't of Corrections*, 985 F. Supp. 968, 969 (S.D. Cal. 1997) (involving prisoner in need of medical attention, who sued prison for \$6,000,000).

²¹⁰ See *id.* at 970 (stating that before court can decide plaintiff's claim, prisoner must exhaust prison's grievance system).

²¹¹ See *id.* (holding that prisoner must work within prison system to have prison hear his case before bringing suit in federal court).

²¹² See *Moore v. Smith*, 18 F. Supp. 2d 1360, 1364 (N.D. Ga. 1998) (stating that courts that allow prisoners' claims to proceed without exhaustion restrict section 1997e(a)).

²¹³ See *id.*

²¹⁴ See *White v. McGinnis*, 131 F.3d 593, 594-95 (6th Cir. 1998) (involving prisoner that sued for monetary, prospective, and declaratory relief after guard allegedly retaliated against

may demand that the prison terminate the guard's employment.²¹⁵ In such situations, the prison's administrative grievance system may provide relief.²¹⁶ The prisoner, therefore, has an available administrative remedy and must comply with section 1997e(a).²¹⁷

Arguably, this proposal could encourage prisoners to sue only for damages for past wrongs in an effort to evade the exhaustion requirement.²¹⁸ Prisoners could bypass section 1997e(a) by refusing to request further corrective action.²¹⁹ However, it is the prison's, not the prisoner's, responsibility to take remedial action if internal problems exist within the prison.²²⁰ Therefore, courts should not require prisoners to satisfy section 1997e(a) when they sue for past wrongs but have not requested further corrective action.²²¹

him); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 969 (N.D. Ill. 1998) (regarding prisoner suing for monetary and prospective relief because guards subjected him to humiliating strip search); *Russo v. Palmer*, 990 F. Supp. 1047, 1048 (N.D. Ill. 1998) (involving prisoner who sued for prospective and monetary relief after guards attacked him and he did not receive proper medical treatment); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *1 (D. Kan. Aug. 14, 1998) (involving prisoner who sued for monetary and prospective relief after prison guards beat him during transfer to another prison); *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *1 (N.D. Ill. Feb. 10, 1998) (involving prisoner who sued for monetary and prospective relief for inadequate medical treatment).

²¹⁵ See *Moore*, 18 F. Supp. 2d at 1361 (involving prisoner that wanted prison to fire guard that allegedly beat him).

²¹⁶ See *White*, 131 F.3d at 595 (holding that plaintiff failed to demonstrate that prison's grievance system was unavailable); *Moore*, 18 F. Supp. 2d at 1364 (holding that prisoner had administrative remedies to exhaust); *Russo*, 990 F. Supp. at 1050 (stating that administrative remedies were available to plaintiff).

²¹⁷ See *Moore*, 18 F. Supp. 2d at 1364 (finding cases that allow prisoners suing for damages to avoid exhaustion requirement unpersuasive); *Russo*, 990 F. Supp. at 1050 (stating that pursuant to section 1997e(a), court should require plaintiff to exhaust all available administrative remedies); *Cooper*, 1998 WL 560044, at *3 (holding that section 1997e(a) applies to plaintiff's prospective relief claim); *Sanders*, 1998 WL 67615, at *4 (subjecting plaintiff's prospective claim to exhaustion requirement).

²¹⁸ See *Moore*, 18 F. Supp. 2d at 1364 (stating that prisoners may avoid exhaustion requirement by including request for damages in complaint).

²¹⁹ Cf. *Moore*, 18 F. Supp. 2d at 1363 (stating that courts should not condition exhaustion on relief prisoner requests).

²²⁰ See *Brown v. Toombs*, 139 F.3d, 1102, 1103 (6th Cir. 1998) (stating that prisons should handle prisoners' grievances because they are familiar and more efficient at resolving claims); *Moore*, 18 F. Supp. 2d at 1364 (stating that prison has strong interest in resolving prisoners' grievances so that courts do not undermine its authority).

²²¹ Cf. *Lunsford v. Juma-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (allowing prisoner's damages claim to proceed without exhaustion because prisoner's suit involved past wrong); *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (allowing plaintiff's claim for damages to proceed without exhaustion even though prisoner did not include declaratory or prospective claim); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (allowing inmate's damages claim for past wrong to proceed without exhaustion even though inmate did not include declaratory or prospective claim); *Sanders*, 1998 WL 67615, at *6 (stating

A futility exception for prisoners that sue for damages for past wrongs also remedies *Brown's* flaws by not requiring prisoners to futilely exhaust prisons' administrative grievance systems.²²² Prospective relief cannot cure a past wrong.²²³ Therefore, prisons' grievance procedures that only provide prospective relief do not remedy past wrongs.²²⁴ Accordingly, this futility exception does not require prisoners that sue for past wrongs to exhaust prisons' administrative grievance systems.²²⁵ Thus, this futility exception balances competing concerns of Congress, prisons, and prisoners.²²⁶

A. Congressional Intent

Courts that allow a futility exception when prisoners sue for damages for past wrongs satisfy the PLRA's underlying goals.²²⁷ First, courts will discourage inmate litigation by subjecting prison-

that when damages provide only meaningful relief, court should not require plaintiff to exhaust administrative remedies). The *Lunsford* court explicitly stated that the prisoner did not include a declaratory claim or request further corrective action. *See* 155 F.3d at 1179. Yet, the court allowed the claim to proceed. *See id.* This does not provide a reason to require prisoners to comply with section 1997e(a), but rather further supports not requiring exhaustion. *See id.*

²²² *See Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998) (stating that administrative grievance procedures could not provide prisoner with relief, thus, prisoner not required to comply with exhaustion requirement); *Sanders*, 1998 WL 67615, at *5 (stating that sensible approach to exhaustion requirement would not require prisoners to exhaust remedies that prison cannot provide).

²²³ *See Lunsford*, 155 F.3d at 1179 (stating that prison's administrative grievance system that only provides prospective relief fails to provide prisoner suing for past wrong with remedy); *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1208 (E.D. Cal. 1997) (stating that prison's grievance procedures cannot remedy plaintiff's claim when claim involves past events).

²²⁴ *See Hollimon*, 6 F. Supp. 2d at 970 (stating that administrative grievance procedures could not provide prisoner with relief, and declining to demand that prisoner comply with exhaustion requirement); *Sanders*, 1998 WL 67615, at *5-6 (stating that sensible approach to exhaustion requirement would not require prisoners to exhaust remedies that prison cannot provide).

²²⁵ *Cf. Lunsford*, 155 F.3d at 1179 (allowing prisoner's claim for past wrong to proceed before prisoner exhausted all available administrative remedies); *Jackson*, 998 F. Supp. at 904 (holding that prisoner's damages claim could proceed without exhaustion because it regarded past wrong); *Freeman*, 996 F. Supp. at 825 (stating that prisoner suffered past wrong so he did not have to comply with section 1997e(a)); *Sanders*, 1998 WL 67615, at *6 (stating that court should not require prisoner to exhaust prison's grievance system when suing for wrong that only damages could remedy); *Lacey*, 990 F. Supp. at 1208 (allowing plaintiff's claim to proceed because it arose from past events).

²²⁶ *Cf. Sanders*, 1998 WL 67615, at *5-6 (applying section 1997e(a) flexibly to further Congress's intent without prejudicing prisoners or frustrating administrative procedures).

²²⁷ *See* 141 CONG. REC. S14,408-01 (1995) (statement of Sen. Hatch) (stating that PLRA will reduce frivolous inmate litigation and limit judicial interference of prison management).

ers that sue for ongoing wrongs to the exhaustion requirement regardless of the prisoners' request for relief.²²⁸ Inmates therefore cannot avoid the exhaustion requirement by suing for damages.²²⁹

Second, this futility exception minimizes federal judicial interference in the prison system.²³⁰ Courts will ensure that prisoners suing for ongoing wrongs exhaust available administrative remedies regardless of their requests for relief.²³¹ Therefore, inmates will not burden the federal courts with litigation that prisons themselves can effectively handle.²³²

B. Plain Language

Courts that utilize a futility exception for prisoners' damages claims for past wrongs will adhere to the plain language of section 1997e(a).²³³ When a prisoner sues for an ongoing wrong, the administrative system provides prospective relief, even if the inmate fails to make such a request.²³⁴ Therefore, prospective relief is an

²²⁸ See *Alexandroai v. California Dep't of Corrections*, 985 F. Supp. 968, 970 (S.D. Cal. 1997) (dismissing plaintiff's damages complaint for failure to exhaust all available administrative remedies). In *Alexandroai*, the plaintiff sued for lack of medical care before the prison treated him. See *id.* at 969. The prisoner was therefore suing for an ongoing wrong. See *id.* Although the prisoner sought damages, the prison could have remedied the situation, making the prison's grievance system an available remedy. See *id.* at 970. The court properly required the prisoner to satisfy section 1997e(a) because administrative remedies were available even though the prisoner only sued for damages. See *id.*

²²⁹ See generally *Moore v. Smith*, 18 F. Supp. 2d 1360, 1364 (N.D. Ga. 1998) (stating that if courts allow prisoners' claims to proceed because of damages request, they could easily avoid statute altogether); *Sanders*, 1998 WL 67615, at *6 (stating that courts should not limit exhaustion requirement by allowing prisoners claims to proceed without exhaustion simply because prisoners sued for damages).

²³⁰ See 141 CONG. REC. S14,611-01 (1995) (statement of Sen. Hatch) (stating that PLRA will decrease judicial micro-management of prisons).

²³¹ See *Alexandroai*, 985 F. Supp. at 969 (stating that prisoner should seek relief through administrative procedure before bringing suit).

²³² See *Brown v. Toombs*, 139 F.3d 1102, 1103 (6th Cir. 1998) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973), and stating that state administrative bodies and state courts are best equipped to handle state prisoners' grievances); *Moore*, 18 F. Supp. 2d at 1364 (stating that courts will have to settle fewer cases if prison can resolve grievance).

²³³ See *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (stating that prisoner that sued for past wrong had no available administrative remedies); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (allowing prisoner's claim to proceed because prison's grievance system was not available to plaintiff and PLRA only required prisoners to exhaust available administrative remedies); *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1205 (E.D. Cal. 1997) (giving "available" its ordinary meaning and holding that prisoner that sues for past wrong has no available administrative remedies to exhaust).

²³⁴ See *Alexandroai*, 985 F. Supp. at 969 (requiring prisoner that sued for damages for ongoing wrong to exhaust prison's grievance system even though prisoner did not request prospective relief).

available remedy for an ongoing wrong.²³⁵ Courts should apply section 1997e(a) to prisoners' suits for ongoing wrongs because the statute does not condition the exhaustion requirement on prisoners' requests for relief.²³⁶

This approach also acknowledges the ordinary meaning of available.²³⁷ As the *Lacey* court noted, the plain meaning of "available" is, "that is accessible or may be obtained," and "immediately utilizable."²³⁸ A prisoner that has suffered a wrong that the prison can cure with prospective relief has an available administrative remedy because the system provides this relief.²³⁹ The prisoner must, therefore, satisfy section 1997e(a) before suing in federal court.²⁴⁰

Further, a futility exception for prisoners' damages requests for past wrongs comports with the ordinary meaning of the word "remedy."²⁴¹ A remedy cures a wrong or solves a problem.²⁴² Pro-

²³⁵ See *Jackson*, 998 F. Supp. at 904 (stating that prison's grievance system that only provided prospective relief was not remedy for past wrong); *Freeman*, 996 F. Supp. at 825 (allowing prisoner's damages claim for past wrong to proceed without exhaustion of remedies because prison's grievance system could not provide relief). In *Jackson v. DeTella*, the court stated that prospective relief could not remedy the prisoner's grievance because he had already suffered a wrong. See 998 F. Supp. at 904. Under this reasoning, if the prisoner still suffered from his grievance, prospective relief from the prison's grievance system would be an available remedy. See *id.* It follows that prospective relief is an available remedy for ongoing wrongs. Cf. *id.*

²³⁶ See *Moore*, 18 F. Supp. 2d at 1364 (stating that Congress did not intend exhaustion requirement to depend on sufficiency of administrative remedies).

²³⁷ See *Lacey*, 990 F. Supp. at 1205 (stating that court should give "available" its ordinary meaning).

²³⁸ See *id.*

²³⁹ See *Montez v. Swart*, No. 298-C0004, 1998 WL 158643, at *1-2 (N.D. Tex. Mar. 19, 1998) (dismissing prisoner's suit for ongoing wrong for failure to exhaust all available administrative remedies). In *Montez*, the prisoner suffered from Pickens Nodules, a disease that caused sores to cover the prisoner's body. See *id.* When the prisoner filed his section 1983 suit, he had not exhausted the prison's grievance system. See *id.* at *2. The prisoner's claim for lack of medical attention was therefore an ongoing wrong. See *id.* As such, the prison's grievance system that only provided prospective relief could have remedied the prisoner's claim. See *id.* The court found that the prisoner could have obtained an injunction from the grievance system. See *id.*

²⁴⁰ See *id.* (requiring prisoner that sued for ongoing wrong to comply with section 1997e(a) because prison's grievance system could provide prisoner with relief).

²⁴¹ See *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *4 (N.D. Ill. Feb. 10, 1998) (stating that to determine meaning of exhaustion requirement, court must define word "remedy" within its plain meaning).

²⁴² See *id.* (stating that plain meaning of "remedy" is redress for an injustice); see also WEBSTER'S DICTIONARY 996 (9th ed. 1985) (defining "remedy" as legal means to obtain relief and assigning synonyms such as relieve, cure, and correct). Using the dictionary definition, the *Sanders* court stated that although a remedy may not always be effective, it is not a remedy if it fails to offer a reasonable chance of success. See 1998 WL 67615, at *4. As an example, the court stated that penicillin would not remedy a broken leg. See *id.*

spective relief cannot cure a past wrong.²⁴³ Therefore, an administrative grievance system that only provides prospective relief does not remedy a prisoner's suit for damages for a past wrong.²⁴⁴

C. Fairness to Prisoners

To require prisoners to exhaust inadequate administrative procedures is a futile exercise.²⁴⁵ A small number of cases have recognized the unfairness of requiring prisoners to exhaust ineffectual grievance systems.²⁴⁶ These courts have invoked the futility exception because the prisoners' claims involved past wrongs.²⁴⁷

²⁴³ See *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (holding that prisoner is not required to comply with section 1997e(a) because prison already provided prospective relief that did not remedy past wrong against prisoner); *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (holding that prospective relief could not remedy prisoner's grievance for a past wrong); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (stating that prison's grievance system that only provides prospective relief cannot remedy past injustice to plaintiff); *Sanders*, 1998 WL 67615, at *6 (stating that damages provides only meaningful relief when prisoner suffers complete and permanent injury); *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199, 1208 (E.D. Cal. 1997) (stating that prospective relief provided by prison's grievance system was inadequate remedy for prisoner's past damages).

²⁴⁴ See *Lunsford*, 155 F.3d at 1179 n.1 (stating that plaintiff's claim only involves past conduct by prison guards); *Jackson*, 998 F. Supp. at 904 (stating that any grievance plaintiff filed would have been futile since beating happened in past); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 969 (N.D. Ill. 1998) (stating that prisoner was not likely to suffer same mistreatment in future because mistreatment was one-time event).

²⁴⁵ Cf. *Jackson*, 998 F. Supp. at 904 (stating that prison's grievance system cannot cure prisoner's grievance).

²⁴⁶ See *id.* (holding that it is futile for courts to require prisoners to seek prospective relief for past wrongs under existing grievance systems); *Sanders*, 1998 WL 67615, at *6 (stating that courts that require prisoners to exhaust grievance systems when systems cannot provide relief prejudice prisoners by delaying their claims); *Lacey*, 990 F. Supp. at 1205-06 (stating that California's internal grievance system is inadequate for damages claim and Congress did not intend to require prisoners to exhaust such a procedure); see also *Lunsford*, 155 F.3d at 1179 (holding that courts should not require prisoner suing for past wrongs to exhaust grievance system that does not provide damages); *Hollimon*, 6 F. Supp. 2d at 970 (following cases that do not require prisoners to exhaust prisons' grievance systems when systems fail to provide adequate relief); *Freeman*, 996 F. Supp. at 825 (stating that prisoner who sues for past wrong is not required to exhaust prison's grievance system when system cannot provide relief).

²⁴⁷ See *Lunsford*, 155 F.3d at 1179 (holding that damages provide only available remedy when prisoner suffered past wrong); *Hollimon*, 6 F. Supp. 2d at 970 (deciding that guards' humiliating strip search of prisoner was one-time event); *Jackson*, 998 F. Supp. at 904 (finding it futile for courts to require plaintiff to exhaust administrative remedies because he already suffered injury); *Freeman*, 996 F. Supp. at 825 (holding that plaintiff does not have to comply with section 1997e(a) because plaintiff's suit involved past wrong); *Lacey*, 990 F. Supp. at 1208 (stating that prospective relief was useless remedy).

For example, the *Sanders* court stated that prospective relief is not a remedy when a prisoner sues for a completed injury.²⁴⁸ Therefore, to be fair, *Sanders* allowed the prisoner's damages claim to proceed.²⁴⁹ The *Lunsford* court was more explicit in invoking the futility exception based on past wrongs.²⁵⁰ The court did not require the prisoner to comply with section 1997e(a) because his claim arose from past conduct.²⁵¹ Because the federal prison only provided prospective relief, the court did not require the plaintiff to exhaust his administrative remedies.²⁵²

Though fair to prisoners, a futility exception will defeat section 1997e(a)'s purpose if courts allow prisoners to avoid administrative remedies.²⁵³ Therefore, courts should mandate that prisoners exhaust the grievance system for ongoing wrongs, even if they only sue for damages.²⁵⁴ Under this approach, prisoners cannot bypass the exhaustion requirement when the administrative scheme can provide corrective action.²⁵⁵

²⁴⁸ See *Sanders*, 1998 WL 67615, at *6 (holding that requiring exhaustion only delays plaintiff's claim when plaintiff suffers completed injury).

²⁴⁹ See *id.* (allowing prisoner's damages claim for past wrong to proceed because exhaustion of remedies would prejudicially delay his claim).

²⁵⁰ See *Lunsford*, 155 F.3d at 1179 (holding that court will not require prisoner to exhaust administrative grievance system because claim was for damages for past wrong and system only provided prospective relief).

²⁵¹ See *id.* at 1179 n.1; see also *Jackson*, 998 F. Supp. at 904 (holding that any grievance prisoner filed with prison after injury occurred would be futile). The court in *Freeman v. Godinez* also noted the distinction between past and ongoing wrongs. See 996 F. Supp. at 825. In *Freeman*, the plaintiff alleged that other prisoners beat him because the guards failed to protect him. See *id.* at 823. The prison moved to dismiss the plaintiff's suit because he failed to exhaust all available administrative remedies. See *id.* at 824. The court did not require the plaintiff to exhaust the prison's administrative grievance system. See *id.* at 825. The court reasoned that the prison was unable to provide the plaintiff with relief for his injuries. See *id.* In other words, the prison's grievance system only provided relief for ongoing wrongs, and the plaintiff sued for a past wrong. See *id.*

²⁵² See *Lunsford*, 155 F.3d at 1179 (stating that prisoner suing for damages for past wrong did not have to exhaust prison's grievance system that only provided prospective relief); see also *Lacey*, 990 F. Supp. at 1208 (holding that grievance system without damages provision does not constitute adequate administrative remedy).

²⁵³ See *Moore v. Smith*, 18 F. Supp. 2d 1360, 1364 (N.D. Ga. 1998) (stating that if prisoners could bypass exhaustion requirement based on type of relief they sought, PLRA would not serve congressional purpose of decreasing prisoner litigation).

²⁵⁴ Cf. *Alexandroai v. California Dep't of Corrections*, 985 F. Supp. 968, 970 (S.D. Cal. 1997) (requiring prisoner suing for damages for ongoing wrong to exhaust prison's grievance system).

²⁵⁵ Cf. *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *6 (N.D. Ill. Feb. 10, 1998) (stating that when prison's grievance system is able to provide prisoner with meaningful relief, court should require prisoner to exhaust system's remedies). Accordingly, some courts have required inmates to exhaust administrative remedies even if the prisoner was only suing for monetary relief. See *Morgan v. Arizona Dep't of Corrections*, 976 F. Supp.

Finally, courts that allow a futility exception for prisoners suing for damages for past wrongs ensure that courts recompense prisoners' lawful claims.²⁵⁶ Administrative systems cannot cure prisoners' damages claims for past wrongs.²⁵⁷ If courts nonetheless require prisoners to comply with section 1997e(a), courts unjustly delay the prisoners' claims.²⁵⁸ However, courts that allow these claims to directly proceed in federal court provide prisoners with potential redress.²⁵⁹

Thus, a futility exception for prisoners that sue for damages for past wrongs balances Congress's intent behind the PLRA, the plain meaning of the statute, and fairness to prisoners.²⁶⁰ In addition, a futility exception remedies the problems of the three current approaches that the courts utilize.²⁶¹

CONCLUSION

On its face, section 1997e(a) of the PLRA requires prisoners to exhaust all available administrative remedies before suing in federal court.²⁶² However, courts have reached three different conclusions regarding section 1997e(a)'s application to prisoners' suits

892, 895 (D. Ariz. 1997) (implying that if plaintiff had exhausted administrative remedies, prison could have provided relief plaintiff sought); *cf.* *Russo v. Palmer*, 990 F. Supp. 1047, 1050 (N.D. Ill. 1998) (stating that court did not require exhaustion for inmate's claim for monetary damages, but required it for his prospective claims because prison provided adequate remedy).

²⁵⁶ *See Sanders*, 1998 WL 67615, at *5 (stating that court should not make administrative system barrier to effective relief).

²⁵⁷ *See Lunsford*, 155 F.3d at 1179 (holding that court does not require prisoner that sues for damages for past wrong to exhaust prison's grievance system because system cannot provide relief); *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (stating that prison's grievance procedures could not provide relief to prisoner suing for past wrong); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (stating that grievance procedure could not compensate plaintiff's injuries once they occurred because procedure did not offer such remedy); *Sanders*, 1998 WL 67615, at *6 (stating that exhausting prison's grievance system cannot cure prisoner's completed injury); *Lacey*, 990 F. Supp. at 1208 (concluding that grievance system does not constitute available administrative remedy for past wrong against prisoner).

²⁵⁸ *See Sanders*, 1998 WL 67615, at *6 (stating that requiring prisoner to exhaust grievance system when system cannot provide relief does nothing but delay prisoner's claim).

²⁵⁹ *Cf. id.* (inferring that when damages provide only meaningful relief to prisoner, courts should allow prisoner's claim to proceed directly to federal court).

²⁶⁰ *Cf. id.* at *5 (stating that courts should balance congressional intent against prisoners' rights when applying exhaustion requirement).

²⁶¹ *See supra* notes 210-236 and accompanying text (explaining how futility exception fixes problems of courts' approaches).

²⁶² *See* 42 U.S.C. § 1997e(a) (Supp. III 1997) (requiring exhaustion of administrative remedies).

for monetary relief.²⁶³ Courts that follow the *Garrett* line of reasoning do not require prisoners that sue for damages to comply with section 1997e(a).²⁶⁴ On the other hand, courts that follow the *Brown* rationale require prisoners to exhaust all available administrative remedies, even when prisoners request damages.²⁶⁵ Finally, other courts have combined the *Garrett* and *Brown* approaches, creating a flexible way to apply section 1997e(a).²⁶⁶

While these three approaches have several beneficial aspects, each contains flaws.²⁶⁷ To remedy these problems, courts should allow a futility exception to section 1997e(a) only when prisoners sue for damages for past wrongs.²⁶⁸ When prisoners sue for past wrongs, the prison's system provides no relief unless prisoners seek further corrective action.²⁶⁹ Because prisons, not prisoners, are

²⁶³ See *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (allowing futility exception to exhaustion requirement); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (dismissing prisoner's entire suit for failure to exhaust available administrative remedies); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (dismissing prisoner's prospective claim, but allowing damages claim to proceed).

²⁶⁴ See *Lunsford*, 155 F.3d at 1179 (holding that court will not require prisoner suing for damages for past wrong to comply with section 1997e(a) in light of fact that prison's grievance system only provides prospective relief); *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (holding that court will not require prisoner to exhaust prison's grievance system because no remedies are available).

²⁶⁵ See *Brown*, 139 F.3d at 1103-04 (holding that prisoner suing for damages must exhaust all administrative remedies in light of statute's plain language); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) (dismissing complaint because plaintiff failed to prove that administrative remedies were inadequate); *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363-64 (N.D. Ga. 1998) (stating that prisoner's futility claim is unpersuasive); *Allen v. Sanders*, No. 298-C0065, 1998 WL 318841, at *1, *10 (N.D. Tex. June 4, 1998) (dismissing plaintiff's complaint for damages because plaintiff failed to exhaust all available administrative remedies).

²⁶⁶ See, e.g., *Russo v. Palmer*, 990 F. Supp. 1047, 1049-50 (N.D. Ill. 1998) (illustrating flexible approach that some district courts use to interpret section 1997e(a)).

²⁶⁷ Cf., e.g., *Sanders v. Elyea*, No. 96-C4559, 1998 WL 67615, at *5-6 (N.D. Ill. Feb. 10, 1998) (criticizing *Garrett* for allowing prisoners to avoid exhaustion requirement by suing for damages).

²⁶⁸ Cf. *Lunsford*, 155 F.3d at 1178-79 (allowing prisoner's claim to proceed because prisoner sued to remedy for past wrong); *Sanders*, 1998 WL 67615, at *5 (stating that courts should balance competing concerns when applying section 1997e(a)).

²⁶⁹ See *Lunsford* 155 F.3d at 1179 (holding that prisoner suing for damages for past wrong is not required to comply with section 1997e(a) because prison's grievance system only provides prospective relief); *Garrett*, 127 F.3d at 1267 (holding that prisoner is not required to exhaust prison's grievance system because no remedies exist); *Moore*, 18 F. Supp. 2d at 1363 (noting that many courts have held that prisoners are excused from exhaustion requirement when suing for monetary relief because grievance systems do not provide money damages); *Hollimon v. DeTella*, 6 F. Supp. 2d 968, 970 (N.D. Ill. 1998) (stating that administrative grievance system available to plaintiff does not provide monetary relief so exhaustion requirement not applicable); *Jackson v. DeTella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (stating that grievance procedures in Illinois do not award monetary relief); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (holding that grievance procedure could not

responsible for correcting internal problems, courts should not require prisoners that sue for past wrongs to exhaust the prison's grievance system in vain.²⁷⁰

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redress plaintiff because plaintiff sued for damages and because grievance system only provided prospective relief); *Cooper v. True*, No. CIV.A.96-3097, 1998 WL 560044, at *3 (D. Kan. Aug. 14, 1998) (holding that court will not require plaintiff to exhaust administrative remedies for monetary relief claim).

²⁷⁰ See *Brown*, 139 F.3d at 1103 (stating that prisons should handle prisoners' grievances because they are familiar with and most efficient at resolving claims); *Moore*, 18 F. Supp. 2d at 1364 (stating that prison has strong interest in resolving prisoners' grievances so that courts do not undermine its authority).